

The Law Commission
Consultation Paper No 155

Legislating the Criminal Code
FRAUD AND DECEPTION

A Consultation Paper

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 12 March 1999, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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THE LAW COMMISSION

**LEGISLATING THE CRIMINAL CODE:
FRAUD AND DECEPTION**

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ABBREVIATIONS

In this paper we use the following abbreviations:

Archbold: Archbold – Criminal Pleading, Evidence and Practice
(1999 ed P J Richardson, unless otherwise stated)

CLRC: Criminal Law Revision Committee

CLRC Eighth Report: Criminal Law Revision Committee, Eighth Report:
Theft and Related Offences (1966) Cmnd 2977

our conspiracy to defraud report: Criminal Law: Conspiracy to Defraud
(1994) Law Com No 228

DPP: Director of Public Prosecutions

ECHR: European Convention on Human Rights

Griew on Theft: Edward Griew, *The Theft Acts* (7th ed 1995)

Hong Kong report: The Law Reform Commission of Hong Kong: Report on
Creation of a Substantive Offence of Fraud (Topic 24) (July 1996)

our money transfers report: Offences of Dishonesty: Money Transfers
(1996) Law Com No 243

Smith on Theft: J C Smith, *The Law of Theft* (8th ed 1997)

SPTL: Society of Public Teachers of Law

the Strasbourg Commission: the European Commission on Human Rights

the Strasbourg Court: the European Court of Human Rights

Working Paper No 104: Criminal Law: Conspiracy to Defraud
(1987) Working Paper No 104

EUROPEAN COURT OF HUMAN RIGHTS CASES

The judgments of the European Court of Human Rights and the decisions and reports of the European Commission on Human Rights referred to in this consultation paper are reported in the following publications:

The official publications of the ECHR, published by Carl Heysmanns Verlag. All of the references in this paper are to Series A (Judgments and Decisions). The citations are in the form *Kokkinakis v Greece* A 260 para 52 (1993). That is a reference to Series A (Judgments and Decisions), volume 260, paragraph 52.

The European Human Rights Reports, a series published by Sweet and Maxwell, which includes judgments of the Court and some Commission decisions. Cases are referred to in the form *Wingrove v UK* (1997) 24 EHRR 1 (volume 24 of the series, page 1).

Decisions and Reports of the European Commission on Human Rights, published by the Council of Europe, and cited in the form *G v Federal Republic of Germany* (1989) 60 DR 252 (volume 60, page 252).

PART I

INTRODUCTION

1.1 In April 1998, the Home Secretary asked¹ this Commission

As part of their programme of work on dishonesty, to examine the law on fraud, and in particular to consider whether it: is readily comprehensible to juries; is adequate for effective prosecution; is fair to potential defendants; meets the need of developing technology including electronic means of transfer; and to make recommendations to improve the law in these respects with all due expedition. In making these recommendations to consider whether a general offence of fraud would improve the criminal law.

THE SIGNIFICANCE OF THE PROJECT

1.2 We welcomed this reference to examine the law of fraud² as part of the comprehensive review of dishonesty offences that we announced in November 1994,³ as we had become increasingly aware that there was a demand for a general offence of fraud, although there has been uncertainty as to what it might cover. Although there is no offence of fraud as such in England, we do have offences which cover it – principally deception, theft, conspiracy to defraud, fraudulent trading and cheating the revenue. There had been calls from the Serious Fraud Office,⁴ and at least one academic commentator,⁵ for a general offence of *dishonesty*. In addition, there had been calls for a general fraud offence similar to the Scottish offence of that name, which is limited to *deception*; Lords Goff of Chieveley⁶ and Donaldson of Lymington⁷ both made powerful pleas for this

¹ Written Answer, *Hansard* (HC) 7 April 1998, vol 310, cols 176–177.

² The classic definition of fraud is Stephen's:

I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words “fraud” or ‘intent to defraud’ or ‘fraudulently’ occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy: *A History of the Criminal Law of England*, Vol 2, pp 121–122.

³ Para 1.16 of Criminal Law: Conspiracy to Defraud (1994) Law Com No 228 (referred to in this paper as our conspiracy to defraud report).

⁴ Serious Fraud Office Annual Report 1997/98 p 9.

⁵ Professor G R Sullivan, “Framing an Acceptable General Offence of Fraud” (1989) 53 JCL 92.

⁶ Lord Goff of Chieveley said:

There is certainly a review taking place at the Law Commission now of a whole range of dishonest behaviour. In my speech in the case of *Predy* I drew attention to the extraordinary simplicity of the law of Scotland on this point, and I have urged the Law Commission to take advantage of the presence in your Lordships’ House of ... Lord Hope of Craighead, who was formerly a Lord President and is now one of the Law Lords.

Commission to consider the introduction of such an offence in England and Wales during the course of debates on what became the Theft (Amendment) Act 1996. These comments led to the Government indicating that it would refer the issue of fraud to this Commission. We will be considering both these types of general fraud offence, as each has supporters.

1.3 As background to the dishonesty project, we knew that the Court of Appeal had made the cogent criticism that “the law of theft [is] in urgent need of simplification and modernisation”.⁸ This has to be seen in the light of the radical and multifarious advances in the use of modern technology since the Theft Act 1968 was passed. In consequence, it is likely that certain acts of dishonesty might not be effectively covered by the present legislation, especially as in 1968 Parliament could not have envisaged all the technological advances and the ensuing problems with which the courts are now concerned. We were, for example, conscious that the Jack Committee on Banking Services⁹ drew attention to various acts of dishonesty which were not covered by the existing legislation.¹⁰

1.4 The Lord Chancellor has recently explained that

The ability to respond effectively to major fraud is of the highest priority to the Government. We recognise that, in recent years, the public has at times felt that those responsible for major crimes in the commercial sphere have managed to avoid justice. Even when fraud is detected, the present procedures are often cumbersome, and difficult to prosecute effectively.¹¹

1.5 Similarly, the then Solicitor-General¹² said in October 1997 of the present law of dishonesty that “the modern sorts of commercial activity, and the modern methods by which dishonest activity may be effected make one constantly worried that the unoverhauled bus may not be able to cope”.¹³

1.6 In 1996, the House of Lords came across a major problem of this kind when it exposed an important lacuna in the law governing the transfer of funds obtained by deception.¹⁴ In that case, it allowed the appeals of *Preddy* and others, who were alleged to have committed mortgage fraud and had been convicted under section 15(1) of the Theft Act 1968. The basis of the House of Lords’ decision was that

Hansard 14 November 1996, vol 575, col 1077.

⁷ Lord Donaldson of Lymington said that the Law Commission “may also want to have a look at the law in Scotland, where I gather it is a great deal simpler. There is simply a common-law offence of fraud.” *Hansard* 14 November 1996, vol 575, col 1073.

⁸ *Hallam*, *The Times* 27 May 1994.

⁹ Banking Services: Law and Practice – Report by the Review Committee (1989) Cm 622.

¹⁰ These points are summarised at para 1.16, n 37 of our conspiracy to defraud report.

¹¹ “The feasibility of a unified approach to proceedings arising out of major City fraud”, KPMG lecture, 24 June 1998.

¹² Lord Falconer of Thoroton QC.

¹³ “Commercial fraud or sharp practice – Challenge for the law” Denning Lecture, 14 October 1997.

¹⁴ *Preddy* [1996] AC 815.

the alleged fraudsters, despite securing the transfer of funds from the lender's account to their own, had not obtained "property belonging to another" as required by section 15(1).¹⁵ According to the House of Lords, the proper analysis was that the transferor's credit balance (the debt owed to the transferor by the bank) was *extinguished*; the defendant obtained something different, namely the chose in action constituted by the debt owed to him by his bank as represented by a credit in his own bank account. The asset was therefore created for the person who obtained the credit balance in his account, and had never belonged to anybody else. So, the prosecution could not show that the borrower defendant had obtained property "belonging to another".

- 1.7 Banking and other institutions were deeply and justifiably concerned by this.¹⁶ On 18 September 1996 this Commission agreed the terms of our report *Offences of Dishonesty: Money Transfers*,¹⁷ which dealt solely with the problems exposed by *Preddy* and was published on 15 October 1996. The recommendations made in it were subsequently enacted (with a minor amendment) as the Theft (Amendment) Act 1996. This case shows the need to reconsider the law of fraud, both generally and in the light of technological changes.
- 1.8 There has been repeated criticism of the length and complexity of fraud trials. For example, Lord Alexander of Weedon QC, a former Chairman of the Bar Council and the Chairman of National Westminster Bank, has drawn attention to problems with serious fraud trials, pointing out that on occasions¹⁸ they were "unfairly protracted, casting long shadows over reputation, and in the end simply failed to do any kind of justice to anyone".¹⁹ He also referred to another case²⁰ as to which he was "in no doubt that this very unsatisfactory trial badly dented City confidence in the criminal process". He suggested that, although much of the criticism was directed to the procedure in criminal trials, there was legitimate criticism of the substantive law in substantial fraud cases, which led to trials of excessive length and to perceptions of injustice. We are concerned to discover whether it is possible to reduce the length and complexity of trials by simplifying the law, while always ensuring that the defendant is fully protected.
- 1.9 We are very conscious of the level of fraud, and this shows the importance of this review. In February 1998, the Institute of Chartered Accountants concluded that "business fraud is a growing problem that affects everyone both in the private and the public sectors ... The cost to the country is huge in terms of those who have to pay for it and the loss of reputation as a safe place to do business."²¹ In 1997, fraud

¹⁵ See Appendix B below.

¹⁶ See our money transfers report, para 1.7.

¹⁷ (1996) Law Com No 243 (referred to in this paper as our money transfers report).

¹⁸ As in the Blue Arrow trial, which started in February 1991 and in which the jury retired exactly one year later.

¹⁹ Address to the Commercial Bar Association on 15 June 1994.

²⁰ The trial of Roger Levitt in November 1993.

²¹ News release, 2 February 1998.

involving the misuse of plastic payment cards had reached £122 million.²² The Benefits Agency suffered an estimated level of fraud of £1.4 billion for income support with fraud being confirmed or strongly suspected in 9.7% of all claims.²³ In the spring of 1998, fraud from fraudulent prescriptions was estimated to be running at between £70 million and £100 million a year.²⁴ Fraudulent claims were costing the British motor insurance industry £30 million a year.²⁵ It is interesting to place the losses attributable to fraud in perspective with those caused by other offences of dishonesty. A recent paper issued by the Institute of Chartered Accountants pointed out that in 1992 “losses of reported fraud totalled £8,500 million whereas the figures for reported burglaries totalled just under £500 million, retail crime £560 million and vehicle crime £700 million.”²⁶

- 1.10 There is an additional and important reason why we believe that it is time for a major review. Parliament has imposed upon us the important duty of promoting the codification of the law.²⁷ From its earliest days, the Commission has seen codification of the criminal law as a central feature of its work; this is an objective that has been achieved in almost all other common law jurisdictions. As we explained in our last Annual Report,²⁸ codification is particularly important to ensure that English law complies with the European Convention on Human Rights (“ECHR”), which requires criminal offences to be defined with reasonable precision.²⁹ Codification would make the criminal law more accessible and comprehensible to ordinary people, whereas at present much of it is unclear, inconsistent or out of date. Its clarification and rationalisation would also lead to a substantial saving of both time and money. As a matter of constitutional principle, also, Parliament should clearly identify what conduct is illegal. Furthermore, the existence of a modern and up-to-date code would show clearly the seriousness with which society regards the control and punishment of crimes. The law of dishonesty is obviously of enormous importance in the administration of justice and would form an important part of the code.³⁰

THE SCOPE OF THE PROJECT

- 1.11 This project is concerned with changes to the substantive law of fraud. We are not considering purely procedural matters, because many of these are being

²² Association for Payment Clearing Services, *Fraud in Focus: an update on measures to prevent plastic card fraud in the UK* (1998).

²³ Written Answer, *Hansard* (HC) 29 July 1998, vol 317, part I, cols 329–330.

²⁴ *Inside Fraud*, Spring 1998, page 3.

²⁵ Lloyd’s List Insurance Day, 14 July 1998.

²⁶ *Taking Fraud Seriously*, Audit Faculty of the Institute of Chartered Accountants of England and Wales, January 1998, p 7.

²⁷ Law Commission Act 1965, s 3(1).

²⁸ Thirty-Second Annual Report 1997 (1998) Law Com No 250, para 1.25.

²⁹ See paras 5.34 – 5.42 below.

³⁰ For a statement of the significance of the incorporation of the ECHR to codification, see Arden J (a former Chairman of the Law Commission), “Criminal Law at the Crossroads: The Impact of Human Rights from the Law Commission’s Perspective and the Need for a Code”, to be published in [1999] Crim LR.

scrutinised by others. The Home Office has published a consultation paper on the use of juries on serious fraud trials, while the Lord Chancellor's Department is looking at the question of preparatory hearings. We believe that it would be a duplication of resources and a waste of public funds for this Commission to look into those matters.

The ambiguity of the term “general fraud offence”

- 1.12 In this paper, we will be concentrating on the final question raised by the terms of reference, namely “whether a general offence of fraud would improve the criminal law”. This is a somewhat unusual exercise for this Commission. Our usual practice is to identify the defects in an area of law and then consider what reforms might serve to eliminate or minimise those defects. In this case, however, we are expressly asked to consider a particular reform in any event, irrespective of what defects we may find. Unfortunately the precise nature of the reform that we are asked to consider is not entirely clear, since the expression “general fraud offence” is not a term of art. We have identified two quite distinct senses in which it is commonly used.³¹
- 1.13 In the first place, it is sometimes used³² to designate what in this paper we call a general *dishonesty* offence. By this we mean (broadly speaking) an offence consisting of any dishonest conduct which causes financial loss to another. Such an offence would rely on the concept of dishonesty to determine whether otherwise legitimate conduct is a crime.³³ But, unlike the existing offences of which this is true (such as theft and fraudulent trading), it would not be confined to particular *kinds* of conduct (such as dealings with property belonging to another, or the carrying on of business by a company); it would include any conduct which causes loss. And, unlike the existing offence of conspiracy to defraud, it would not require the participation of more than one person. In this sense a general fraud offence would be, essentially, an offence of *fraudulent conduct* – acts or omissions which, if done or planned in concert with another person, would amount to the existing offence of conspiracy to defraud.
- 1.14 Secondly, however, the term “general fraud offence” may also denote a general *deception* offence. By this we mean (again, broadly speaking) an offence consisting in a deception which causes loss to another. Such an offence might or might not require proof of dishonesty too; but, even if it did, that requirement would be largely incidental. In most cases it would be the presence or absence of the element of deception that would determine whether the causing of a particular loss is or is not criminal.

The options

- 1.15 Since the “general fraud offence” that we are asked to consider might be based either on the element of dishonesty or on that of deception, four basic options suggest themselves:

³¹ For a fuller explanation of this distinction see paras 4.3 – 4.9 below.

³² Eg in our Working Paper No 104.

³³ We explore this function of dishonesty in Part III below.

- (1) a general dishonesty offence;
- (2) a general deception offence;
- (3) more limited reforms to the law of deception, falling short of a general deception offence; and
- (4) no change to the present law.

In this paper we provisionally reject the first and second of these options, but provisionally propose the third.

The issues

- 1.16 Apart from the considerations to which we have referred, it seems to us that the question of a general dishonesty offence is a matter of major and fundamental importance that will have to be determined before we can make progress with other aspects of our dishonesty project. For example, if we decide in the light of responses that there should be a general dishonesty offence, we will have to consider the extent to which specific offences should be abandoned or modified so as to take account of the extension to the ambit of the criminal law that a general dishonesty offence would effect. On the other hand, if it is thought that a general dishonesty offence is not required, we would have to look at specific offences in a different light and in greater detail.
- 1.17 Our inquiry will entail consideration of a number of issues of basic and far-reaching importance. One such issue is the role of dishonesty. At present, it is an element of the offences of theft,³⁴ deception³⁵ and conspiracy to defraud.³⁶ There has been sustained and cogent criticism from prominent academic writers of the importance attached to dishonesty. It is obvious and inevitable that, in order to decide whether there should be a general offence of dishonesty, we must reach a decision on the role that dishonesty should play. In this context we are conscious that at least three fairly general offences of dishonesty already exist. First, we have theft itself which, as a result of the decision in *Gomez*,³⁷ is now a broadly based dishonesty offence. Fraudulent trading³⁸ has been widened so that it applies not only to frauds on the creditors of an insolvent company but to many dishonest acts, provided that they are committed in the course of business by a British company. Conspiracy to defraud is a very wide offence.³⁹ Once we have decided whether there is a need for a general dishonesty offence, and where the outer limits of the law of dishonesty should be set, we may subsequently reconsider these offences.

³⁴ See paras 2.7 – 2.11 below.

³⁵ See para 2.16 below.

³⁶ See paras 2.26 – 2.29 below.

³⁷ [1993] AC 442. In this case the House of Lords decided that, for the purposes of theft, an “appropriation” of property need not be unauthorised by the property’s owner. See para 2.4 below.

³⁸ See para 2.33 below.

³⁹ See paras 2.26 – 2.30 below.

- 1.18 Finally, we have already concluded, in our conspiracy to defraud report, that we could not recommend any restrictions on the use of conspiracy to defraud “unless and until ways can be found of preserving its practical advantages for the administration of justice”.⁴⁰ Our view at that time was that conspiracy to defraud added substantially to the reach of the criminal law in the case of certain kinds of conduct (or planned conduct) which should in certain circumstances be criminal.⁴¹ We set out a number of instances of conduct within that category, some of which we have subsequently considered. One such lacuna was that it was not possible to prosecute an individual for obtaining a loan by deception.⁴² We recommended that the offence of obtaining services by deception, contrary to section 1 of the Theft Act 1978, should extend to such a case;⁴³ this recommendation was repeated in our money transfers report⁴⁴ and implemented by section 4 of the Theft (Amendment) Act 1996. Another lacuna, that of corruption not involving consideration,⁴⁵ has been addressed in our recent report on corruption.⁴⁶ Yet another, the unauthorised use or disclosure of confidential information,⁴⁷ is the subject of our continuing project on the misuse of trade secrets.⁴⁸ There are further possible lacunae that might emerge if conspiracy to defraud were abolished. We think that the proper course is to await the responses to this consultation paper and then, if it is agreed that a general offence of dishonesty would not be appropriate, consider whether the matters that we have previously considered as possible lacunae should be the subject of specific new offences. We are very conscious that some of them are highly controversial.⁴⁹
- 1.19 The scope of this paper is limited but important. We are confident that the responses to it will assist us greatly in subsequent work on the dishonesty project.

THE STRUCTURE OF THIS PAPER

- 1.20 In Part II we outline the present law of fraud, which is to be found in the offences of conspiracy to defraud, fraudulent trading, cheating the revenue, theft and deception. In Part III we examine the different kinds of function performed by requirements of dishonesty in these existing offences. In Part IV we then look at the case for a general fraud offence. The arguments in favour of such an offence are essentially very similar whether it takes the form of a general dishonesty offence or a general deception offence, and for this reason we consider in Part IV

⁴⁰ Conspiracy to defraud report, para 5.16.

⁴¹ *Ibid*, para 4.74.

⁴² *Halai* [1983] Crim LR 624; conspiracy to defraud report, paras 4.30 – 4.31

⁴³ *Ibid*, at para 4.76.

⁴⁴ Para 3.50, and cl 4 of the Bill annexed to the report.

⁴⁵ Conspiracy to defraud report, paras 4.56 – 4.57.

⁴⁶ Legislating the Criminal Code: Corruption (1998) Law Com No 248.

⁴⁷ Conspiracy to defraud report, paras 4.7 – 4.9.

⁴⁸ Legislating the Criminal Code: Misuse of Trade Secrets, (1997) Consultation Paper No 150.

⁴⁹ See Professor Sir John Smith, “Conspiracy to Defraud: Some Comments on the Law Commission’s Report” [1995] Crim LR 209.

the case for introducing either form of offence. The arguments *against* a general dishonesty offence, however, are quite distinct from those against a general deception offence, and for this reason we consider them separately, in Parts V and VI respectively. Our provisional conclusion, in each case, is that an offence of the kind under consideration would be too wide and indeterminate to be acceptable.

- 1.21 In Part VII, we consider how the existing deception offences might usefully be extended to close lacunae in the law, and whether some of the advantages claimed for a general fraud offence in terms of more effective prosecution might be delivered without resorting to such a wide offence. We then consider in Part VIII the proper limits of the concept of deception, and how we might deal with the problems of credit card fraud and the “deception” of machines. We conclude that a new offence of imposing a legal liability on a third party is required, and that the “stealing” of services should be an offence. Finally, in Part IX we consider whether the logical implication of our provisional rejection of a general dishonesty offence is that we should be abolishing, or at least defining in more acceptable terms, the existing offences (such as theft and conspiracy to defraud) which rely heavily on the concept of dishonesty.
- 1.22 We are very grateful for the assistance we have had from our consultant, Professor Sir John Smith, CBE, QC, FBA, LLD, Emeritus Professor of Common Law at the University of Nottingham, and from Dr Joanna Benjamin. Mr David McCarthy, formerly a partner at Clifford Chance, kindly provided us with assistance with matters relating to Eurobonds; and we gratefully acknowledge the assistance of Sheriff Iain McPhail QC with Scottish law.

SUMMARY OF PROVISIONAL PROPOSALS, CONCLUSIONS AND CONSULTATION ISSUES

- 1.23 We consider the advantages of a general dishonesty offence, but take the provisional view that it is undesirable in principle that conduct should be rendered criminal solely because fact finders are willing to characterise it as “dishonest”.⁵⁰ It is also at least doubtful whether such an offence would be sufficiently certain to comply with the requirements of the European Convention on Human Rights. We therefore provisionally reject the option of creating a general dishonesty offence.⁵¹
- 1.24 We then turn our attention to a general deception offence, and our provisional conclusion is that such an offence in principle extends the law too far and in too indeterminate a way to be justifiable. Lacunae in the law of deception do exist, but we provisionally conclude that they should be addressed by specifically targeted extensions to the existing offences, rather than by means of a general deception offence.⁵²
- 1.25 We therefore make provisional proposals as to how the law of deception might be extended. We provisionally propose that, for the purposes of the offence of obtaining property by deception, it should be sufficient that the person to whom

⁵⁰ Paras 5.9 – 5.32.

⁵¹ Paras 5.33 – 5.53.

⁵² Paras 6.2 – 6.30.

the property belongs is deprived of it by deception, whether or not anyone else *obtains* it. This would overcome any problems analogous to those revealed by *Preddy*,⁵³ in, for instance, financial markets.⁵⁴

- 1.26 We consider whether the requirement of intention permanently to deprive should remain an element of obtaining property by deception. We provisionally conclude that it should not, but invite views on other options, including its replacement by a general requirement of an intention to cause significant practical detriment, or its abolition subject to particular exceptions in specific circumstances.⁵⁵
- 1.27 The offence of obtaining services by deception is limited to services provided on the understanding that they have been or will be paid for. We provisionally propose that this criterion should be widened to include, first, a service which is provided free, but only because of the deception; and, secondly, a service provided with a view to gain. This would include services which are not specifically paid for, but are provided for economic reasons, such as free banking facilities.⁵⁶
- 1.28 We ask whether the requirement in the deception offences that the relevant consequence be *caused by* the deception causes any difficulty in practice and, if so, we invite suggestions as to how the requirement might usefully be modified.⁵⁷
- 1.29 In considering the general dishonesty offence, we provisionally accept criticisms of the notion of dishonesty, which would be the central feature of such an offence. We go on to consider whether dishonesty should continue to feature as a separate element of the existing deception offences, and our provisional conclusion is that it should not. However, we propose that it should be a defence to any of those offences that the defendant secures the requisite consequence in the belief that he or she is legally entitled to do so, whether by virtue of the deception or otherwise.⁵⁸
- 1.30 We discuss the advantages, in terms of the effective prosecution of fraud, of continuing offences such as fraudulent trading, and we invite views on whether, where a single fraudulent scheme involves the commission of two or more deception offences, the carrying out of the scheme should be considered a single offence which could be charged as a single count on an indictment. We further ask for preliminary views as to whether such an offence should be committed where the fraudulent scheme involves two or more offences of theft, or theft and one or more deception offences.⁵⁹
- 1.31 An important issue is what the boundaries of the concept of deception should be. We conclude that deception should be understood as the inducing of a state of

⁵³ [1996] AC 815.

⁵⁴ Paras 7.4 – 7.7.

⁵⁵ Paras 7.8 – 7.30.

⁵⁶ Paras 7.31 – 7.34.

⁵⁷ Paras 7.35 – 7.38.

⁵⁸ Paras 7.39 – 7.59.

⁵⁹ Paras 7.60 – 7.75.

mind, which can be effected by words or conduct, without the need to find a representation.⁶⁰

- 1.32 We consider the problems of charging offences involving the use of credit, debit and cheque cards (or any similar instrument which may be developed). We are concerned about the effectiveness and appropriateness of using the existing deception offences in such circumstances. We propose instead a new offence of imposing a legal liability on another person. A person would be guilty of the offence if he or she intentionally or recklessly causes a legal liability to pay money to be imposed on another, knowing that the other does not consent to its imposition and that he or she has no right to impose it. For the purposes of this offence, the victim should not be regarded as consenting to the imposition of liability if his or her consent was procured by deception. The offence would not be committed, however, if the person imposing the liability believes that the other would consent if he or she knew all the material circumstances.⁶¹
- 1.33 It is becoming possible, particularly on the internet, fraudulently to obtain the benefit of significant services without deceiving a human mind. Such conduct is not presently criminal, and we provisionally consider that it should be, but that this change should be effected by extending the offence of theft or creating a separate theft-like offence, rather than by extending the concept of deception. We are not directly concerned with theft in this paper, and so we make no proposal, but will return to the issue when we review the law of theft.⁶²
- 1.34 We provisionally conclude that non-disclosure alone should not count as deception, whether or not there is a legal duty to disclose.⁶³

⁶⁰ Paras 8.2 – 8.7.

⁶¹ Paras 8.8 – 8.32.

⁶² Paras 8.36 – 8.58.

⁶³ Paras 8.59 – 8.65.

PART II

THE CURRENT LAW

- 2.1 In this Part we set out the basic features of the main offences of fraud, namely theft, the deception offences, conspiracy to defraud, fraudulent trading and cheating the revenue. These offences are described in detail in the standard textbooks,¹ and their limitations are examined later in this paper; we therefore give only a brief outline at this stage. However, we conclude this Part by examining a problem of particular concern, namely the possible implications for financial markets of the House of Lords' decision in *Preddy*.²

THEFT

- 2.2 Under section 1(1) of the Theft Act 1968 "a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it". This definition shows that there are five ingredients of the offence of theft, namely (i) an appropriation (ii) of property (iii) belonging to another (iv) which is dishonest (v) with the intention of permanently depriving the other of the property appropriated. We will consider each of these ingredients in turn.

Appropriation

- 2.3 By section 3 of the Theft Act 1968, it is provided that
- (1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.
 - (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.
- 2.4 This is a very wide provision. It is not necessary to show that the defendant assumed *all* the rights of an owner: the assumption of *any* of those rights will suffice.³ So the removal of an article from a shelf in a shop, and the changing of the price label, was held to constitute "the assumption of one of the rights of the owner and hence an appropriation".⁴ It is now settled by the House of Lords'

¹ See, for example, *Archbold, Blackstone's Criminal Practice* (1998 ed, ed P Murphy) and J C Smith and Brian Hogan, *Criminal Law* (8th ed 1996), as well as specialist books on dishonesty: Smith on Theft, Griew on Theft, A T H Smith, *Property Offences* (1994) and *Arlidge and Parry on Fraud* (2nd ed 1996).

² [1996] AC 815; para 1.6 above.

³ *Gomez* [1993] AC 442; *Morris* [1984] AC 320.

⁴ *Gomez* [1993] AC 442, 459G, *per* Lord Keith.

decision in *Gomez*⁵ that a “consent to or authorisation by the owner of the taking by the rogue is irrelevant”.⁶ The mental state of the owner is also irrelevant, because appropriation is “an objective description of the act done irrespective of the mental state of either the owner or the accused”.⁷ It is perhaps unsurprising that, despite its apparent simplicity, the application of this rule has not been without difficulty.⁸

Property

- 2.5 By section 4 of the Theft Act 1968, property is partially defined as including “money and all other property, real or personal, including things in action and other intangible property”. Land, and things forming part of land and severed from it, are included in the definition of property but can be stolen only in certain circumstances. Other things that cannot be stolen include electricity⁹ and confidential information.¹⁰

Belonging to another

- 2.6 Under section 5(1) of the Theft Act 1968, property is regarded as belonging to any person “having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).”¹¹ The significant feature is that theft can be committed against people with lesser interests than ownership. So, an owner of property can steal the property from someone else with a sufficient interest, including possession through bailment.¹² Subsections (2)–(5) of section 5 provide that

⁵ [1993] AC 442.

⁶ *Ibid*, at p 464B, approving the approach of Viscount Dilhorne (with whom the other Law Lords agreed) in *Lawrence v Metropolitan Police Commissioner* [1972] AC 626 at pp 631–632 that

I see no ground for concluding that the omission of the words “without the consent of the owner” was inadvertent and not deliberate, and to read the subsection as if they were included is, in my opinion, wholly unwarranted. Parliament by the omission of these words has relieved the prosecution of the burden of establishing that the taking was without the owner’s consent. That is no longer an ingredient of the offence.

⁷ *Gomez* [1993] AC 442, 495H, *per* Lord Browne-Wilkinson.

⁸ In *Mazo* [1997] 2 Cr App R 518 the Court of Appeal assumed that a valid gift *inter vivos* could not be theft; but this approach was doubted in *Hopkins and Kendrick* [1997] 2 Cr App R 524 and *Hinks* [1998] Crim LR 904, in which the Vice President, giving the judgment of the court, stated three reasons why a jury should not be asked to consider whether a gift had been validly made – “first, that is not what section 1 of the Theft Act requires; secondly, such an approach is inconsistent with *Lawrence* and *Gomez*, and thirdly, the state of mind of the donor is irrelevant to the appropriation” (quotation taken from the transcript of the case, no 9800043 X4).

⁹ *Low v Blease* [1975] Crim LR 513.

¹⁰ See *Oxford v Moss* (1979) 68 Cr App R 183; Legislating the Criminal Code: Misuse of Trade Secrets (1997) Consultation Paper No 150, para 1.4.

¹¹ Theft Act 1968, s 5(1).

¹² *Turner (No 2)* [1971] 1 WLR 901.

property also belongs to another in certain other circumstances, though these cases will usually fall within subsection (1) in any event.

Dishonesty

- 2.7 We will consider the role of dishonesty in greater detail later;¹³ at this stage we merely give a brief outline. Section 2(1) of the Theft Act 1968 gives some assistance by providing a partial definition of dishonesty: a person's appropriation is not to be regarded as dishonest
- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
 - (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or
 - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
- 2.8 The statute also points out that an appropriation *may* be dishonest notwithstanding that the person responsible for the appropriation is willing to pay for the property.¹⁴ It is a question of fact whether an appropriation in such circumstances *is* dishonest.¹⁵
- 2.9 In *Ghosh*¹⁶ the Court of Appeal explained how the requirement of dishonesty should be construed in cases to which section 2(1) does not apply. The issue of dishonesty must be considered in the light of what the defendant's state of mind is found to have been: "if the mind of the accused is honest, it cannot be deemed dishonest merely because members of the jury would regard it as dishonest to embark on that course of conduct."¹⁷
- 2.10 The basic approach in *Ghosh* is that the jury should determine whether the accused was acting dishonestly in two stages:

[A] jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself

¹³ See Part III and paras 7.39 – 59.

¹⁴ Theft Act 1968, s 2(2).

¹⁵ *Boggeln v Williams* [1978] 1 WLR 873.

¹⁶ [1982] QB 1053.

¹⁷ [1982] QB 1053, 1064A.

must have realised that what he was doing was by those standards dishonest.¹⁸

- 2.11 Such a direction is not necessary in all cases, but only if the defendant has raised the issue – for example, by suggesting that he or she did not know that anybody would regard his or her action as dishonest.¹⁹ The *Ghosh* principle applies not only to theft but also to offences of deception,²⁰ fraudulent trading²¹ and conspiracy to defraud.²²

Intention permanently to deprive

- 2.12 The time at which the intention permanently to deprive must be proved to have existed is the time when the property was appropriated. In order to determine whether the prosecution has satisfied this requirement, section 6 of the Theft Act 1968 provides some guidance. The requirement is satisfied if the intention of the appropriator is “to treat the thing as his own to dispose of regardless of the [owner’s] rights”; and a borrowing or lending of it may amount to so treating it, if it is “for a period and in circumstances making it equivalent to an outright taking or disposal.”²³ The prosecution would then be regarded as having established the intention permanently to deprive, even though the defendant may have intended the owner eventually to get back the thing appropriated.²⁴

DECEPTION OFFENCES

- 2.13 The Theft Acts create eight offences of dishonestly getting something by deception, namely:
- (1) obtaining property;²⁵
 - (2) obtaining a money transfer;²⁶
 - (3) obtaining a pecuniary advantage;²⁷
 - (4) procuring the execution of a valuable security;²⁸
 - (5) obtaining services;²⁹

¹⁸ [1982] QB 1053, 1064D–E.

¹⁹ *Roberts* (1987) 84 Cr App R 117.

²⁰ As in *Ghosh* itself.

²¹ *Buzalek* [1991] Crim LR 115.

²² *Ghosh* [1982] QB 1053, 1059H.

²³ Theft Act 1968, s 6(1).

²⁴ *Lloyd* [1985] QB 829, 834B.

²⁵ Theft Act 1968, s 15.

²⁶ Theft Act 1968, s 15A, inserted by the Theft (Amendment) Act 1996 as recommended in our money transfers report.

²⁷ Theft Act 1968, s 16.

²⁸ Theft Act 1968, s 20(2).

- (6) securing the remission of a liability;³⁰
- (7) inducing a creditor to wait for or to forgo payment;³¹ and
- (8) obtaining an exemption from, or an abatement of, a liability.³²

2.14 There are three elements common to all these offences. The first is that of deception. “Deception” is defined as

any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.³³

The courts have given a generous interpretation to the concept of deception by conduct. Thus a person may be guilty of deception not only by tendering a cheque which is likely to be dishonoured,³⁴ but also by tendering a cheque which *will* be honoured, if this is so only because the drawer has backed it with a cheque guarantee card which he or she is not authorised to use.³⁵

2.15 The second element common to all the offences is that the benefit in question must be obtained³⁶ *by* deception. This means that the obtaining must be a consequence of the deception,³⁷ and in addition must not be too remote from the deception.

2.16 The third common element is that the obtaining of the benefit by deception must be “dishonest”. Whether it is dishonest is a question to be determined in accordance with the approach laid down in *Ghosh*.³⁸

2.17 We now summarise the elements of the individual offences in turn.

Obtaining property

2.18 The obtaining must be of specific property. “Property” includes land (which can be *stolen* only in certain circumstances). The property obtained must be property

²⁹ Theft Act 1978, s 1.

³⁰ Theft Act 1978, s 2(1)(a).

³¹ Theft Act 1978, s 2(1)(b).

³² Theft Act 1978, s 2(1)(c).

³³ Theft Act 1968, s 15(4).

³⁴ The person tendering a cheque is representing “that the existing state of facts is such that in the ordinary course the cheque would be met”: *Metropolitan Police Commissioner v Charles* [1977] AC 177, 191B, *per* Lord Edmund-Davis, citing with approval the words of Pollock B in *Hazelton* (1874) LR 2 CCR 134 at 140.

³⁵ *Metropolitan Police Commissioner v Charles* [1977] AC 177. See also *Lambie* [1982] AC 449, and paras 8.8 – 8.16.

³⁶ Different verbs are used such as “procure”, “secure” and “induce”, but we will use “obtain” to include the other verbs.

³⁷ *Collis-Smith* [1971] Crim LR 716.

³⁸ [1982] QB 1053; see paras 2.9 – 2.11 above.

“belonging to another”, and for this purpose the definition in section 5(1) applies.³⁹ It is this requirement that, according to *Preddy*,⁴⁰ is not satisfied when a person obtains a transfer of funds from one bank account to another.

- 2.19 The word “obtain” includes not only obtaining for oneself but also “obtaining for another or enabling another to obtain or to retain.”⁴¹ As in the case of theft, the prosecution must show an intention permanently to deprive.

Obtaining a money transfer

- 2.20 As we have already explained, in *Preddy*⁴² the House of Lords exposed a lacuna in the Theft Act which meant that somebody who by deception obtained a transfer of funds between bank accounts might be guilty of no offence, because he or she was not obtaining “property belonging to another” within the meaning of section 15. In order to meet this problem, this Commission proposed an offence which was inserted as section 15A of the Theft Act 1968 by the Theft (Amendment) Act 1996. This offence is committed where a person “by any deception ... dishonestly obtains a money transfer for himself or another”.⁴³ A money transfer occurs when a debit is made to one account, a credit is made to another, and the credit results from the debit or vice versa.⁴⁴ By contrast with the offence of obtaining property by deception, there is no requirement of an intention permanently to deprive.

Obtaining a pecuniary advantage

- 2.21 This offence, created by section 16 of the Theft Act 1968, applies where a person “by any deception dishonestly obtains for himself or another any pecuniary advantage”.⁴⁵ However, the expression “pecuniary advantage” is limited to the case where a person is allowed to borrow by way of overdraft or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so, or is given the opportunity to earn remuneration (or greater remuneration) in an office or employment, or to win money by betting.⁴⁶

Procuring the execution of a valuable security

- 2.22 Section 20(2) of the Theft Act 1968 makes it an offence, dishonestly and with a view to gain or with intent to cause loss, by deception to procure the execution of a valuable security. “Valuable security” is defined by section 20(3) in unmodernised language redolent of the offence’s nineteenth century roots, and it is clear that the offence was originally aimed at cheques, bills of exchange and other negotiable instruments. The courts have extended it to include a CHAPS⁴⁷ order

³⁹ But the extensions to that definition in s 5(2)–(5) do not.

⁴⁰ [1996] AC 815; para 1.6 above.

⁴¹ Theft Act 1968, s 15(2).

⁴² [1996] AC 815.

⁴³ Theft Act 1968, s 15A(1).

⁴⁴ Theft Act 1968, s 15A(2).

⁴⁵ Theft Act 1968, s 16(1).

⁴⁶ Theft Act 1968, s 16(2)(b) and (c).

⁴⁷ Clearing House Automatic Payment System.

requiring the electronic transfer of funds from one bank account to another, but not to the telegraphic transfer of funds.⁴⁸

- 2.23 Section 20(2) contains a list of acts which are to count as “execution”. The House of Lords has held that the term refers to acts done *to* the document (such as signing it) or in connection with it. It does not include *giving effect* to the document by carrying out the instructions in it, such as delivering goods or paying money.⁴⁹

Obtaining services

- 2.24 Under section 1 of the Theft Act 1978, an offence is committed by a person who by deception dishonestly obtains services from another. This offence is very wide: “services” are obtained if the other person is induced “to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for”,⁵⁰ or “to make a loan, or to cause or permit a loan to be made, on the understanding that any payment (whether by way of interest or otherwise) will be or has been made in respect of the loan”.⁵¹

Evasion of liability

- 2.25 Section 2(1) of the Theft Act 1978 creates three offences⁵² of evading liability by deception. An offence is committed by a person who, by any deception,
- (a) dishonestly secures the remission of the whole or any part of any existing liability to make a payment, whether his own or another’s; or
 - (b) with intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor or any person claiming payment on behalf of the creditor to wait for payment (whether or not the due date for payment is deferred) or to forgo payment; or
 - (c) dishonestly obtains any exemption from or abatement of liability to make a payment.

CONSPIRACY TO DEFRAUD

- 2.26 This offence was expressly preserved when most other forms of common law conspiracy were abolished.⁵³ It exists in two main forms, which are not mutually exclusive. The first variant was described by Viscount Dilhorne as follows:

[A]n agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be

⁴⁸ *King* [1992] 1 QB 20; *Manjadarria* [1993] Crim LR 73.

⁴⁹ *Kassim* [1992] 1 AC 9, disapproving *Beck* [1985] 1 WLR 22.

⁵⁰ Theft Act 1978, s 1(2).

⁵¹ Theft Act 1978, s 1(3). This provision was inserted by the Theft (Amendment) Act 1996 in accordance with a recommendation made in our conspiracy to defraud report, and reverses the decision in *Halai* [1983] Crim LR 624.

⁵² *Holt* [1981] 1 WLR 1000.

⁵³ Criminal Law Act 1977, s 5(2), as amended by the Criminal Justice Act 1987, s 12.

entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.⁵⁴

This form of the offence does not necessarily involve deception.⁵⁵

- 2.27 The second form of the offence requires a dishonest agreement by two or more persons to “defraud” another by deceiving him or her into acting contrary to his or her duty.⁵⁶ It now appears to be settled that the person deceived need not be a public official,⁵⁷ and need not suffer any economic loss or prejudice.⁵⁸
- 2.28 Conspiracy to defraud requires proof of dishonesty in the *Ghosh*⁵⁹ sense. There is uncertainty whether there can be a conspiracy to defraud where the fraud would be a mere side-effect (rather than the true object) of the scheme agreed to, but the prevailing view is that there can.⁶⁰
- 2.29 For there to be a conspiracy, there must be a firm agreement between the parties.⁶¹ But it need not be envisaged that the fraud will be carried by the conspirators themselves.⁶² There is a wide variety of cases which would amount to conspiracy to defraud.⁶³

⁵⁴ *Scott v Metropolitan Police Commissioner* [1975] AC 819, 840E–F.

⁵⁵ *Ibid.*

⁵⁶ This was recognised in *Scott v Metropolitan Police Commissioner* [1975] AC 819 and considered more fully by the Privy Council in *Wai Yu-Tsang* [1992] 1 AC 269.

⁵⁷ *Wai Yu-Tsang* [1992] 1 AC 269. The contrary was suggested in *DPP v Withers* [1975] AC 842 and by Lord Diplock in *Scott v Metropolitan Police Commissioner* [1975] AC 819.

⁵⁸ *Wai Yu-Tsang* [1992] 1 AC 269, approving and adopting the statements of Lords Denning and Radcliffe in *Welham v DPP* [1961] AC 103.

⁵⁹ [1982] QB 1053; see paras 2.9 – 2.11 above.

⁶⁰ In *A-G's Reference (No 1 of 1982)* [1983] 1 QB 751, it was held that this would not amount to a conspiracy to defraud. But in *Wai Yu-Tsang* [1992] 1 AC 269 at p 280, Lord Goff of Chieveley, delivering the advice of the Privy Council, explained:

It is however important ... to distinguish a conspirator's intention (or immediate purpose) ... from his motive (or underlying purpose). The latter may be benign to the extent that he does not wish the victim or potential victim to suffer harm; but the mere fact that it is benign will not of itself prevent the agreement from constituting a conspiracy to defraud.

Another example is *Cooke* [1986] 1 AC 909, in which stewards employed by British Rail sold their own food (rather than that of British Rail) to customers and were held to be guilty of conspiring to defraud British Rail. The fact that their *purpose* was to make a profit, not to defraud British Rail, was irrelevant.

⁶¹ So there is no conspiracy if negotiations fail to result in a firm agreement between the parties: *Walker* [1962] Crim LR 458. Nor is there a conspiracy between two parties if each of them has conspired *separately* with a third party: *Griffiths* [1966] 1 QB 589. Nevertheless, it is possible to have conspiracies where parties never meet each other, such as in a *chain* conspiracy, where A agrees with B, B agrees with C, C agrees with D, etc. Again, in a *wheel* conspiracy A reaches agreements with B, C and D: *Ardalan* [1972] 1 WLR 463.

⁶² So in *Hollinshead* [1985] 1 AC 975 the defendants were guilty of conspiracy to defraud where they had agreed to market devices designed to falsify gas or electricity meters which would enable customers (who were not themselves party to the conspiracy) to defraud their

2.30 We must also mention at this stage the offence of statutory conspiracy.⁶⁴ This consists in a conspiracy to commit another offence (for example, one of the deception offences). A conspiracy to defraud, by contrast, need not involve any other offence. Statutory conspiracy overlaps with conspiracy to defraud whenever the course of conduct agreed upon would necessarily involve the commission of an offence by one or more of the parties to the conspiracy *and* would involve a fraud being practised on another person. In such a case, the prosecution can choose which charge to pursue.⁶⁵ Conspiracy to defraud may be advantageous for the prosecution if there is doubt as to which, if any, substantive offences would be involved.

FRAUDULENT TRADING

2.31 Section 458 of the Companies Act 1985 provides:

If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who was knowingly a party to the carrying on of the business in that manner is liable to imprisonment or a fine, or both.

2.32 Although the wording of the section might suggest that it applies only where the whole business is fraudulently conducted, the approach of the courts has been that a single transaction will suffice, and the offence is committed where only one part of the business of the company is fraudulently conducted.⁶⁶ There must, however,

gas and electricity suppliers. It was held to be irrelevant that the defendants had no intention of using the devices themselves.

⁶³ Examples would be an agreement to conceal a bank's losses or liabilities from shareholders, creditors and depositors: *Wai Yu-Tsang* [1992] 1 AC 269; an agreement by British Rail catering staff to sell their refreshments to customers whilst on duty, thereby depriving British Rail of profits from sales: *Cooke* [1986] 1 AC 909; and an agreement to make pirate copies of films, thereby depriving the makers and distributors of legitimate profits: *Scott v Metropolitan Police Commissioner* [1975] AC 819.

⁶⁴ This is dealt with in s 1(1) of the Criminal Law Act 1977, which (as amended) provides:

Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either

- (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
- (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

⁶⁵ Criminal Justice Act 1987, s 12.

⁶⁶ In *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262, Templeman J said at p 268 that a single transaction could suffice as "it does not matter ... that only one creditor was defrauded, and by one transaction, provided that the transaction can properly be described as a fraud on a creditor perpetrated in the course of carrying on business." So in *Philippou* (1989) 89 Cr App R 290 it was held that the fraudulent obtaining of an air travel organiser's licence from the Civil Aviation Authority involved the carrying on of business for a fraudulent purpose, as the licence was essential to that business.

be dishonesty in the *Ghosh* sense.⁶⁷ The offence does not require an intent to cause financial loss to another person:⁶⁸ deliberately and dishonestly putting another's property and financial interests in jeopardy will suffice.⁶⁹ Deception is not required.⁷⁰

- 2.33 The courts have construed this offence very widely. The Court of Appeal has held that the mischief aimed at is fraudulent trading generally. The offence can consist in the defrauding of customers as well as creditors.⁷¹
- 2.34 The only people who may be guilty of fraudulent trading are those who exercise some control or managerial function within the company:⁷² employees who exercise no such functions, such as junior managers or branch managers, are not regarded as being party to the carrying on of the company's business.
- 2.35 It is important to appreciate that this offence applies only to companies subject to the Companies Act, namely companies incorporated in England and Wales or Scotland. The affairs of foreign companies, and partnerships, are therefore outside the remit of the offence.

CHEATING THE REVENUE

- 2.36 The common law offence of cheating was abolished for most purposes in 1968,⁷³ but was preserved "as regards offences relating to the public revenue". In this residual form it is a valuable weapon for the Inland Revenue, the Commissioners of Customs and Excise and the Department of Social Security.
- 2.37 The offence has been widely construed. It covers any form of fraudulent conduct by which money is diverted from revenue-gathering authorities, and it can be committed by omission as well as by positive act.⁷⁴

THE IMPLICATIONS OF *PREDDY* FOR FINANCIAL MARKETS

- 2.38 The House of Lords' decision in *Preddy*,⁷⁵ and the Theft (Amendment) Act 1996 which sought to close the lacuna thus revealed, related only to transfers of money.⁷⁶ Concerns were raised in the House of Lords during the passage of the Theft (Amendment) Bill, however, that a similar situation may arise in financial markets in respect of property other than money. Such property may be transferred

⁶⁷ [1982] QB 1053; see paras 2.9 – 2.11 above.

⁶⁸ *Welham v DPP* [1961] AC 103.

⁶⁹ *Allsop* (1977) 64 Cr App R 29.

⁷⁰ *Scott v Metropolitan Police Commissioner* [1975] AC 819.

⁷¹ *Kemp* [1988] QB 645.

⁷² *Miles* [1992] Crim LR 657.

⁷³ Theft Act 1968, s 32(1).

⁷⁴ *Mavji* (1987) 84 Cr App R 34; *Redford* (1989) 89 Cr App R 1; and note the criticism in J C Smith and Brian Hogan, *Criminal Law* (8th ed 1996), p 582.

⁷⁵ [1996] AC 815; para 1.6 above.

⁷⁶ See paras 1.6 and 2.20 above.

between “accounts”, and transactions involving it may, like banking transactions, be settled through clearing systems. It is therefore possible, on one view, that the *Preddy* problem – the fact that what a lay person regards as a transfer of property is in law the extinction of one piece of property and the creation of another – may arise in relation to such transactions. At the committee stage in the House of Lords, Lord Donaldson of Lynton, the Chairman of the Financial Law Panel, specifically mentioned CREST, the system for the electronic trading of shares, and the two Eurobond clearing systems, Euroclear (which is located in Belgium) and Cedel Bank (in Luxembourg).⁷⁷

- 2.39 There are, it appears to us, two particular features of financial markets which possibly give rise to the *Preddy* problem: the way in which clearing systems operate, and the nature of the negotiability of negotiable instruments. We treat each separately below, although in practice (as, for instance, with Eurobonds) they may both be present in a particular market.

The operation of clearing systems

- 2.40 In such systems, the clearing company keeps records, or accounts, of the securities held to the name of each client or member. For our current purpose it is possible to distinguish two types of system. Where the contracts between the clearing company and its members are such that the members retain property in the securities held in the system, the accounts are merely records of the members’ property. We tend to the view that, in such a system, the transfer of the securities from one account to another is ordinarily a simple transfer of title⁷⁸ from member A to member B, and the *Preddy* problem does not arise.⁷⁹ On the other hand, if property in the underlying security is held within the clearing system,⁸⁰ the accounts are a record of the clearing house’s obligations to its members, such obligations being directly analogous to the indebtedness of a bank to its clients.⁸¹ In those circumstances it may be that, when member A makes a transfer to member B, the clearing company’s obligation to A (in other words, A’s thing in action against the clearing company) is reduced in size or extinguished, and the clearing company undertakes a new or greater obligation to B instead. If B obtains the transfer by deception, it would follow that B cannot be charged with obtaining property belonging to another, because what B has obtained is not “property

⁷⁷ *Hansard* (HL) 14 November 1996, vol 575, cols 1073–1074.

⁷⁸ Leaving aside the case where the underlying security is a negotiable instrument, which is discussed below.

⁷⁹ The Government spokeswoman, Baroness Blatch, told the House of Lords during the debates on the Theft (Amendment) Bill 1996 that CREST (one of the clearing systems mentioned by Lord Donaldson on second reading) did not give rise to the *Preddy* problem for essentially this reason: *Hansard* (HL) 5 December 1996, vol 576, col 799.

⁸⁰ Being either held by the clearing system itself, or by a depository on its behalf.

⁸¹ As in those involved in the Eurobond market, where the equitable title is probably vested in the clearing system. Most Eurobonds are bearer bonds, and legal title vests in the institution having custody of the bond for the time being. This is usually a depository, but could be the clearing house itself.

belonging to another” but a newly-created thing in action (or an increase in B’s existing one).⁸²

- 2.41 It is, however, far from certain that this is in fact the case. It is possible to take the view that the *Preddy* problem can arise even in the first kind of clearing system, where property is retained by the client of the system. The argument is that, where the securities are undifferentiated,⁸³ for that reason alone the interest of the client is in the nature of an intangible claim, a chose in action rather than a chose in possession. Some would take this even further, and suggest that the *Preddy* problem could arise where the “economic owner” of, say, a share, is not the registered, legal owner (that person being a nominee), and might be unable to assert ownership in equity.
- 2.42 On the other hand it can be argued that, even in the second sort of clearing system, the *Preddy* problem does not arise, because what takes place when property is transferred between one account and another is an *assignment* rather than the diminution of one chose in action and the increase in another. In the *Preddy* situation, the bank account of the transferor at one bank is debited and the account of the transferee at another bank is credited.⁸⁴ Thus, in the case of a transfer between bank accounts, the counter-intuitive conclusion (that one thing is destroyed and another thing comes into being) is unavoidable because the debtors are different banks. It is impossible to regard the transfer as a simple assignment of the transferor’s thing in action to the transferee. In clearing systems, however, both accounts are *necessarily*⁸⁵ held with the same clearing company. The same conclusion is not merely avoidable, but contrary to the common understanding of those involved in the transaction. That which is transferred must be a chose in action (rather than the security itself, which is still held by the clearing company), because of the nature of clearing systems; but it is perfectly feasible, and closer to the lay understanding, to say, where it is possible to do so, that the chose in action is assigned by one customer to another.⁸⁶

⁸² Consider as an analogy a warehouse in which a number of grain merchants store their grain. The grain is of identical quality and when brought to the warehouse by individual merchants it is put into a single container, the individual holdings of the merchants being indicated in records kept by the warehouse-keeper. Where the contracts provide that property is retained by the merchants, an entry in the book is a record of the property of the individual merchant, and a transfer is of the property of the merchant. The grain itself is not destroyed and re-created. Where property passes to the warehouse-keeper, on the other hand, the records are of how many bushels of the *warehouse-keeper’s* grain he or she *owes* each merchant, and a transfer involves the destruction or diminution of one thing in action and the creation or increase of another.

⁸³ That is, all the property in the clearing system is traded without individuals’ holdings being linked to particular, physical underlying securities.

⁸⁴ Of course, they might by coincidence both be accounts with the same bank, but it is unlikely that such a coincidence would fundamentally change the legal analysis.

⁸⁵ Except where a “bridge” exists between one clearing system and another, which allows securities to be taken from one system and credited to another.

⁸⁶ This analysis may be problematic in some situations, as the formalities in the Law of Property Act 1925, s 136 (writing and notice to the debtor) would have to be fulfilled for an assignment to be effective in law.

- 2.43 The true legal position, it will be seen, is unclear; and it would be unwise, as well as reprehensible, for anyone to assume that *Preddy* precludes liability for fraudulent conduct in a particular financial market. However, this lack of clarity is of itself, in our view, a compelling reason to ensure that the *Preddy* problem does not recur.

Negotiable instruments

- 2.44 The second feature of financial markets which, it has been suggested, might give rise to the *Preddy* problem lies in the nature of negotiability itself. An instrument may be “negotiable” by virtue either of statute, principally the Bills of Exchange Act 1882, or of that part of the common law known as the law merchant. The essential quality that distinguishes a negotiable instrument is what happens on transfer of title. Transfer can be achieved by delivery and endorsement, or simple delivery of the bond itself, which embodies the thing in action against the original issuer. The key point is that when a negotiable instrument is transferred, any defect in the title of the seller is extinguished by transfer to a bona fide purchaser for value. Such a purchaser may therefore acquire a better title than the seller. This is not a mere assignment of rights under a contract, does not require the formalities prescribed in section 136 of the Law of Property Act 1925, and amounts to a radical departure from the normal rules of privity of contract.⁸⁷
- 2.45 It can be argued that this feature of negotiability opens up the possibility of the *Preddy* problem. Negotiability means that the purchaser enters into a direct legal relationship with the acceptor (that is, the person who originated the negotiable instrument and remains liable on it). The seller falls completely out of the picture.

The note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note bona fide, not by virtue of any assignment of the promise, but by an original and direct promise moving from the maker to the bearer.⁸⁸

In such circumstances, it is argued, the transfer should be interpreted not as the passing of title from A to B, but rather as the extinction of A’s rights as against the issuer accompanied by the springing up of new rights in B against the issuer. If this is correct, clearly the *Preddy* problem arises.

- 2.46 However, it is also possible to argue the contrary position. In the first place, merely because the purchaser can acquire a *better* title than the seller, it does not follow that the purchaser does not acquire the seller’s title. Although the general rule is that a person cannot pass on a greater title than he or she enjoys – *nemo dat quod non habet*, in the traditional Latin tag – it is not universal. Before the abolition of market overt, a thief who sold stolen property in such a market passed good title. The traditional rule was that a bona fide purchaser in good faith took land free of equitable interests of which he or she had no notice. There is no conceptual

⁸⁷ See *Chitty on Contracts* (27th ed 1994) vol II, para 33-001.

⁸⁸ *Bullard v Bell* (1817) Mason 243; 4 F Cas, 267, 627, *per* Story J, quoted in J S Ewart “Negotiability and Estoppel” (1900) 16 LQR 135. This article argues that, to the extent that it is intelligible at all, the notion of negotiability is founded on estoppel, as part of the general law, rather than being an independent creature of the law merchant.

difficulty in regarding the negotiability of negotiable instruments as simply an exception to the *nemo dat* rule.

- 2.47 Further, the analysis under which the *Preddy* problem would arise can be said to ignore or over-simplify the nature of negotiable instruments, by considering them purely as choses in action. Physical possession of the instrument itself is important. Indeed, its physical nature is crucial to its function.

The document is treated as a chattel ... [It is because] the obligation is locked up in the document, [that] the delivery of the document, with any necessary endorsement, is all that is needed to transfer obligation.⁸⁹

- 2.48 In truth, it may be said that negotiable instruments straddle the boundary between tangible and intangible property. They “embody” things in action, but can also be regarded as

a special type of personal property. They differ from most types of chattel in that their possession confers certain contractual rights on the holder. But they differ from contracts by reason of the existence of proprietary elements.⁹⁰

If this is right, then it is likely that a court called upon to determine whether the *Preddy* problem arises would at least be free to emphasise the physical as against the intangible, and to find that a real passing of property from transferor to transferee had taken place.⁹¹

- 2.49 This view is reinforced by consideration of the most familiar form of negotiable instruments, namely bank notes. “Bank notes as choses in action or promissory notes are subject to the Bills of Exchange Act 1882”.⁹² If the analysis giving rise to the *Preddy* problem were right, the absurd consequence would follow that no-one could be convicted of obtaining property by deception where the property in question is a bank note. It would mean that, by handing the note to the fraudster, the victim does not part with his or her property, but rather accomplishes the extinction of his or her existing chose in action against the Bank of England and the creation of a new one vested in the fraudster. The only property belonging to the victim which the fraudster acquires is the virtually worthless paper and ink of which the bank note is composed. Any analysis which led to this palpably absurd result must be false.

- 2.50 We provisionally incline to the view that this second argument is correct, and that the obtaining of property by deception does not fall outside section 15 of the Theft

⁸⁹ Roy Goode, *Commercial Law* (2nd ed 1995) p 54.

⁹⁰ *Chitty on Contracts* (27th ed 1994) para 33-002.

⁹¹ In *Preddy* [1996] AC 815 it was said at p 836 that, where D deceives V into drawing a cheque in D’s favour, D does not obtain property belonging to another because the thing in action represented by the cheque belongs to D from the start. But Sir John Smith has pointed out that this overlooks the importance of the physical thing, the valuable security: “Obtaining Cheques by Deception or Fraud” [1997] Crim LR 396.

⁹² F A Mann, *The Legal Aspect of Money* (5th ed 1992) p 12. The provisions relating to bills apply to bank notes only with certain modifications.

Act 1968 *merely* because the property in question is a negotiable instrument. We think that the contrary is arguable *only* if for this purpose there is some material distinction between bank notes and other negotiable instruments. Nevertheless, the existence of doubt on these points is a matter of concern, and one which in our provisional view should be remedied.

PART III

THE ROLE OF DISHONESTY IN THE PRESENT LAW

- 3.1 In this Part, we set out the curious historical development of what has become a very broad notion of dishonesty in Theft Acts offences today. We then analyse dishonesty as an element of offences in terms of the role that it is capable of performing, and consider the existing offences in which its role is particularly significant.

THE MEANING OF DISHONESTY IN FRAUD OFFENCES

Historical development

- 3.2 Crimes of dishonesty in England start with larceny. Originally, the common law offence of larceny was an offence solely against *possession*. It was committed when tangible goods were “taken and carried away” without the consent of the owner, with the intention of permanently depriving the owner of the goods. No offence was committed where an owner voluntarily surrendered possession. Over time, this simple offence was extended, both by the common law (for example “larceny by trick”)¹ and by statutory intervention (for example, embezzlement by clerks or servants).² A number of other quite separate offences were also introduced to deal with particular problems. Amongst the most important were obtaining by false pretences, embezzlement and fraudulent conversion. In 1959, the Home Secretary asked the Criminal Law Revision Committee (CLRC), a body composed largely of judges and academics, to consider “larceny and kindred offences” and make recommendations. The result was the CLRC’s eighth report, published in 1966, which in turn gave birth to the Theft Act 1968.
- 3.3 This Act was a fundamental reform.³ The new offence of theft replaced larceny, which by that time had about twenty distinct forms in which the basic offence was modified by reference to the relationship between the victim and the defendant, the method by which the property was obtained, the nature of the property or the presence of various aggravating circumstances. The maximum sentences for the various forms of larceny varied between life imprisonment (larceny of wills, postal packets or mailbags) and imprisonment for six months (larceny of dogs, on the first offence). Theft also replaced embezzlement and fraudulent conversion. The 1968 Act introduced the term “dishonestly”. In the Larceny Act 1916, which essentially stated the common law without reform, the basic definition of larceny was that “a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to

¹ *Pear* (1779) 2 East PC 685, 168 ER 208.

² Embezzlement Act 1799, repealed by the Statute Law Revision Act 1861; Criminal Statutes (England), repealed by the Statute Law Revision Act 1873.

³ The Act largely followed the CLRC’s Eighth Report. For the extent of the reform, see paras 1–5 of the report.

deprive the owner thereof”.⁴ In the Theft Act, “dishonestly” replaced the expression “fraudulently and without a claim of right made in good faith”.

- 3.4 The principal reason for preferring the word “dishonestly” to “fraudulently” was that it would be easier for juries to understand:

“Dishonestly” seems to us to be a better word than “fraudulently”. The question “was this dishonest?” is easier for a jury to answer than the question “was this fraudulent?”. “Dishonesty” is something which laymen can easily recognise when they see it, whereas “fraud” may seem to involve technicalities which have to be explained by a lawyer.⁵

- 3.5 The CLRC did not offer a full definition of dishonesty, although they did draft a partial, negative definition, which became the three paragraphs of section 2(1),⁶ specifying three situations in which it is provided that those who appropriate are not dishonest. Section 2(1)(a) provides that a person is not to be regarded as dishonest if he or she believes he or she has a right in law to deprive the owner of the property appropriated. By section 2(1)(b), a person is not dishonest if he or she appropriates property believing that the owner would consent if he or she knew the circumstances. Section 2(1)(c) reproduces from a provision in the Larceny Act 1916⁷ the rule that the finder of property could not be guilty of theft unless he or she believed that the owner could reasonably be discovered.⁸
- 3.6 The CLRC said that the purpose of what became section 2(1) was to “preserve specifically two rules of the present law”.⁹ The rule in paragraph (c) is straightforward. As to the rule in paragraphs (a) and (b), the corresponding element in larceny and the other offences comprised two parts – “fraudulently” and “without a claim of right made in good faith”. However, it was unclear what “fraudulently” meant independently of “a claim of right”, or if indeed it had any meaning at all. There was comparatively little case law.¹⁰ A renowned commentator

⁴ Larceny Act 1916, s 1(1).

⁵ CLRC Eighth Report, para 39.

⁶ For the text, see Appendix A, para 39.

⁷ Section 1(2)(d).

⁸ Section 2(2) is also a stipulation about dishonesty, but works in the opposite way, specifying that someone may be dishonest even if they appropriate property for which they are willing to pay. This provision (which was subject to some re-drafting during the passage of the Bill) was mentioned only in the notes on the draft Bill at Annex 2 of the report, where it was stated that its inclusion was to avoid the argument that “it would not be theft to take property and pay full value for it even if the taker knew that the owner was unwilling to sell”.

⁹ Para 39. In the committee’s draft Bill, what are now paragraphs (a) and (b) of s 2(1) were united in paragraph (a). The paragraph was separated into two to improve the clarity of the drafting: *Hansard* (HL) 8 April 1968, vol 291, col 10.

¹⁰ This makes the CLRC’s reference to the “technicality” of “fraudulently” puzzling. The explanation offered by Sir Rupert Cross in “The Theft Bill I: Theft and Deception” [1966] *Crim LR* 415, 416, was that “‘fraud’ is one of those irritating words which seems more technical than it really is”. In *Holloway* (1849) 3 *Cox CC* 241, before the Larceny Acts, Parke B held in the Court for Crown Cases Reserved that in East’s definition of larceny (2 *East P C* 553), the phrase “wrongful and fraudulent” meant the same as “claim of right”. This was not followed in *Williams and Williams* [1953] 1 *QB* 660, in which the Court of

on the Larceny Acts, JW Cecil Turner, did not consider that “fraudulently” added anything to “claim of right”, although, noting that it seems to have originated in a term used by the twelfth century writer Bracton (*fraudulosa*), he suggested that it “retains something of the ancient moral significance which [previously] attached to the word ‘felonious,’ and therefore serves to indicate that the offender must know that he is doing what is contrary to the standards of social conduct prevailing in the community.”¹¹

- 3.7 The CLRC intended “dishonestly” to be a more modern and easily understood term to replace “fraudulently and without a claim of right made in good faith”, covering much the same ground. The uncertainty as to the meaning of “fraudulently” suggests that at the very least, the claim of right was the central concept. By including only a partial definition of dishonesty, the CLRC set out the core meaning, but left open the possibility of its expansion. The development of the law since the 1968 Act is the story of the expansion of dishonesty, both in meaning (or potential meaning) and in its significance within offences.

The determination of the meaning of dishonesty: *Feely* and *Ghosh*

- 3.8 In *Feely*,¹² a case of theft, the Court of Appeal decided that it was for the jury, not the judge, to determine whether the defendant had acted dishonestly; that the term related to the defendant’s state of mind, not his or her conduct; that “dishonesty” was an ordinary English word,¹³ and that it was therefore unnecessary

Criminal Appeal attempted to define “fraudulently”. The attempt was generally agreed to have been unsuccessful, however, the definition adding nothing to existing principles of law: see J C Smith, “The Fraudulent Sub-Postmistress” [1955] Crim LR 18; *Russell on Crime* (12th ed 1964) pp 997–998.

It had been suggested that where a defendant took money from, for example, an employer’s till, intending and able to repay it, but without the employer’s consent, or even against the employer’s instructions, it might be possible to argue that he or she was not acting “fraudulently”. See Goddard CJ’s extempore judgment in *Williams and Williams*, reported in [1953] 1 All ER 1068, 1070 and [1953] 2 WLR 937, 942. The suggestion was excised when the judgment was revised for reporting in [1953] 1 QB 660 and (1954) 37 Cr App R 71. There is an account of the circumstances in *Feely* [1973] 1 QB 530, 539 to 540.

In *Cockburn* [1968] 1 WLR 281, a case on the old law reported in 1968, it was made clear that *any* borrowing without the consent of the owner would amount to larceny, even if the facts reveal no moral obloquy, and the judge should so direct the jury. A claim to a moral, as opposed to a legal, right was said in *Harris v Harrison* [1963] Crim LR 497 not to provide a defence to embezzlement (as being not fraudulent). Glanville Williams had suggested that, for instance, a bailee who used the coins entrusted to him for his own purposes, intending to replace them immediately from his own funds and being able to do so, might escape liability on the basis that he had a moral claim of right, which would render his conduct not fraudulent (*Criminal Law: The General Part* (2nd ed 1961) p 322). To further confuse the picture, Sir Bernard MacKenna suggested in “The Undefined Adverb in Criminal Statutes” [1966] Crim LR 548, 551, that Glanville Williams’ example would be covered by what became s 2(1)(b).

¹¹ *Russell on Crime* (12th ed 1964, edited by Dr Turner) p 996.

¹² [1973] QB 530.

¹³ The court was following *Brutus v Cozens* [1973] AC 854, in which the House of Lords held that the meaning of ordinary English words in legislation was a matter of fact for the jury, unless the context made clear that the word was being used in an unusual or technical sense. It has been persuasively argued that the key dictum in the case is now effectively dead, and that *Feely* is one of only two cases in which it has truly been followed:

and undesirable for a judge to define it. The case was taken to lay down an objective test for dishonesty (that is, that the honesty of the defendant was to be judged according to a standard set down by the jury, rather than his or her own estimation of his or her conduct).

- 3.9 In *Ghosh*,¹⁴ a two part test for dishonesty was set down. The test tells fact-finders how to decide whether the defendant's conduct was dishonest: it does not tell them what dishonesty is. In most cases, it was said, any gloss on the term would be unnecessary.¹⁵ Where it was necessary, the jury should be told

first of all [to] decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If, however, the defendant's conduct was dishonest by that light,

then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest ... It is dishonest for a defendant to act in a way which he knows ordinary people to consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.

The court considered that Robin Hood, or anti-vivisectionists who remove animals from laboratories, were dishonest because, although they would consider themselves justified, they would know that ordinary people would consider their actions dishonest.

- 3.10 The *Ghosh* direction is not required unless the defendant has raised the issue that he or she did not know that anybody would regard what he or she did as dishonest.¹⁶ In other cases, the jury are generally told merely that the word "dishonestly" bears its ordinary meaning, which will be well known and understood by all of them.
- 3.11 The change accomplished by *Feely* and *Ghosh* is more fundamental than a change in the definition of dishonesty, because no definition is provided: instead, the fact-finders are left to give that requirement whatever meaning they think fit. Where once a judge was able to tell a jury that certain things were or were not within the words "fraudulently and without a claim of right", and thus (at least) limit the potential definitions open to a jury to apply, the judge cannot now tell them that particular conduct *is* dishonest – only, where appropriate (that is, where section 2(1) of the 1968 Act applies) that it is not.

DW Elliott, "*Brutus v Cozens: Decline and Fall*" [1989] Crim LR 323. In *Paul* [1999] Crim LR 79, the Court of Appeal noted that *Brutus v Cozens* was disregarded by the courts, including the House of Lords, and endorsed the criticisms made by Professor Elliott.

¹⁴ [1982] QB 1053.

¹⁵ *Ghosh* [1982] QB 1053, 1064.

¹⁶ *Roberts* (1987) 84 Cr App R 117.

THE POSITIVE AND NEGATIVE FUNCTIONS OF DISHONESTY

- 3.12 In our 1987 consultative document on conspiracy to defraud, one of the options suggested to replace conspiracy to defraud was a form of general fraud offence. Our formulation was as follows:

Any person who dishonestly causes another person to suffer [financial] prejudice, or a risk of prejudice, or who dishonestly makes a gain for himself or another commits an offence.¹⁷

- 3.13 In the responses to the paper, there was wide support for a general fraud offence, and equally wide opposition to this formulation. The central problem was perceived to be that dishonesty should not play such a central role in determining liability. In their response, the Criminal Law Reform Sub-Committee of the Society of Public Teachers of Law (“SPTL”) noted that dishonesty was “being asked to do virtually all the work” of the offence. They continued (writing before the decision in *Gomez*):¹⁸

We believe that it is unsuited to this role, and that the Commission’s suggestion for its use in this way represents a serious misunderstanding of its proper function in the criminal law. In our view dishonesty in the Theft Acts is better seen as a negative feature which controls liability that would otherwise arise in respect of prima facie unlawful conduct Thus although [dishonesty] is an element which must be proved by the prosecution in all cases, it is usually established on the basis that the defendant chose to engage in defined conduct (appropriation; deception) which is wrongful. But in the Commission’s general fraud offence dishonesty would have both the excusing function which it has in the Theft Acts *and* the inculcating role normally filled by a detailed statement of the actus reus of the offence.

- 3.14 The same basic distinction was made by Professor Glanville Williams, also writing before *Gomez*. He compares dishonesty as an element of conspiracy to defraud and as an element in the Theft Act offences. In the former offence, “Anything that the jury labels (and is allowed to label) as dishonest becomes punishable as the object of a conspiracy to defraud”, whereas for the Theft Act offences “you must appropriate property belonging to another, etc; for obtaining you must obtain property by deception, etc. The requirement of dishonesty is an extra”.¹⁹
- 3.15 We consider that this distinction is important. Adapting the terminology of the SPTL response, where dishonesty is the main determinant of liability, it acts as a *positive* element in the offence. The conduct requirements of such an offence are very general, and occur frequently in commerce or indeed in everyday life. Thus dishonesty “does all the work” in such offences. It turns what would otherwise not be even prima facie unlawful (say, making a gain or causing prejudice) into a crime.

¹⁷ Working Paper No 104, para 12.4.

¹⁸ [1993] AC 442.

¹⁹ Glanville Williams, *Textbook of Criminal Law* (2nd ed 1983) p 708.

- 3.16 Dishonesty may also feature, as an “element”, in offences in which the conduct requirements are much more substantial. In such offences, the conduct requirements describe conduct which may be considered *prima facie* criminal (subject, of course, to the proof of mental elements). The requirement of dishonesty, though in form an element of the offence which must be proved like any other, in effect provides the defendant with a defence. It operates primarily to *exempt* from criminal liability conduct which one would *prima facie* expect to be criminal – for example, obtaining property by deception with the intention of permanently depriving the owner of it. In these cases we refer to it as a *negative* element.
- 3.17 The distinction can be illustrated by the role of dishonesty in theft, in which dishonesty fulfils a positive function,²⁰ and obtaining by deception, where it does not.²¹ When a person selects a newspaper to buy at a newsagent’s, he or she has committed all the elements of theft save for dishonesty. On the other hand, obtaining property by deception is something that one would naturally *expect* to be criminal. It is so rare for such conduct *not* to be wrong that dishonesty hardly does any work at all in the latter offence.²²

EXISTING OFFENCES WITH DISHONESTY AS A POSITIVE ELEMENT

- 3.18 While *Feely*²³ and *Ghosh* have left the issue of what is and is not dishonest to be determined by the fact-finders, the element of dishonesty has become relatively more important as other elements have been watered down. It is increasingly a positive element rather than a negative one.
- 3.19 For example, as we have seen in Part II,²⁴ theft is now a much broader offence than the CLRC apparently intended it to be. The (surviving) effect of *Morris*²⁵ is that it is the assumption of *any* right of an owner that is capable of amounting to appropriation, not only the assumption of *all* of the rights of the owner. *Gomez*²⁶ established that a right is assumed, and therefore an appropriation takes place, even where the owner consents to or authorises the conduct which amounts to the appropriation. The combined effect of these two cases was described by Professor Sir John Smith in the form of a definition of theft which takes them into account:

Anyone doing anything whatever to property belonging to another, with or without the authority or consent of the owner, appropriates it;

²⁰ See paras 3.19 – 3.20 below.

²¹ See para 7.39 above.

²² This distinction is not completely watertight: an offence may be defined in such terms that it is debatable whether the function of its dishonesty element is positive or negative. We would not describe any of the existing offences of theft, deception or fraud as borderline cases, but it is possible to imagine such a case. See para 5.4 below.

²³ [1973] QB 530.

²⁴ Para 2.4 below.

²⁵ [1984] AC 320.

²⁶ [1993] AC 442.

and, if he does so dishonestly and with intent, by that act or any subsequent act, permanently to deprive, he commits theft.²⁷

- 3.20 And *Hinks*,²⁸ by holding that even the acceptance of a valid gift may amount to theft if the fact-finders choose to characterise it as dishonest, removes the only significant limitation that might have been thought to survive *Gomez*. As a result of these cases, the importance of the concept of dishonesty has increased enormously. Before 1968, it meant little more than the absence of a claim of right. It now makes all the difference between conduct which is morally irreproachable and conduct punishable with seven years' imprisonment.
- 3.21 A similar trend towards increased reliance on the concept of dishonesty has taken place in respect of fraudulent trading.²⁹ *Kemp*³⁰ extended that offence in such a way that, where a person is knowingly a party to the carrying on of the business of a company, guilt is established upon proof that that business was carried on for any "fraudulent" (that is, dishonest)³¹ purpose. It had previously been thought that the offence extended only to conduct in the nature of insolvency fraud.
- 3.22 Again, in conspiracy to defraud,³² *Scott*³³ established that there was no requirement for loss to be caused by deceit, as had once been thought.³⁴ The offence now consists simply of an agreement dishonestly to cause loss (or the risk of loss). But most commercial activity is intended, at least in part, to result in loss to one's competitors and corresponding gain for oneself. Any such activity which ordinary people might think dishonest is liable to be characterised as criminal fraud.
- 3.23 Finally, the offence of cheating the public revenue consists of any dishonest act or omission intended to prejudice the revenue. As David Ormerod has pointed out,

It is difficult to see how the offence could be stated in more expansive terms. The breadth of the offence means that often the only live issue at trial will be dishonesty.³⁵

He cites the case of *Charlton*³⁶ as an example of conduct which, according to the defence, was a legitimate attempt at tax avoidance, but which became criminal once the jury characterised it as not merely unsuccessful but dishonest.

²⁷ *The Law of Theft* (8th ed 1997) para 2-05.

²⁸ [1998] Crim LR 904.

²⁹ See paras 2.31 – 2.35 above.

³⁰ [1988] QB 645.

³¹ *Ghosh* dishonesty is an element of fraudulent trading: *Cox and Hodges* (1982) 75 Cr App R 291.

³² See paras 2.26 – 2.30 above.

³³ [1975] AC 819.

³⁴ Cf the dicta of Buckley J in *Re London and Globe Finance Corp* [1903] 1 Ch 728, 732–733.

³⁵ "Cheating the Public Revenue" [1998] Crim LR 627, 630.

³⁶ [1996] STC 1418.

The difficulty in distinguishing the shades of avoidance and evasion means that it is *always* possible for the Revenue to charge a defendant with cheating in respect of a scheme which is alleged to be dishonest evasion and which the (non)taxpayer believes to be, at worst, an ineffective avoidance scheme. Commentators on the decision in *Charlton* asked how what they perceived to be merely ineffective tax avoidance could be criminal. The criminal lawyer's response to that is simple: the schemes might be classified as ineffective tax-avoidance in civil law, but that does not prevent them being criminal because the cheating offence is now so broad that it turns solely on the question of dishonesty.³⁷

3.24 Thus in theft, fraudulent trading, conspiracy to defraud and cheating the public revenue, dishonesty is now the principal determinant of criminality: it operates as a "positive" element. In each case, the objective conduct required by the offence is common and unexceptionable in ordinary life. We refer to these offences as "positive-dishonesty offences".³⁸

3.25 However, even in these offences the elements other than dishonesty, while arguably of little significance in terms of moral culpability, must still be proved. That which is appropriated in theft must still be property, and belong to another; conspiracy to defraud requires an agreement; fraudulent trading can only be committed by a person carrying on the relevant business; cheating the public revenue requires an intention to prejudice the revenue. Even these "positive-dishonesty" offences are not as broad as a *general* dishonesty offence, such as the one defined in our 1987 working paper on conspiracy to defraud.³⁹ One of the main issues for consideration in this paper is whether these offences, far from being too wide because they rely so heavily on the concept of dishonesty, are too *narrow*, in that they require other elements as well; and whether the law should be extended further by the creation of a *general* offence of dishonestly causing loss. We consider this issue in Parts IV and V below.

³⁷ [1998] Crim LR 627, 637.

³⁸ Dishonesty also continues to be used as a negative element of new offences. For instance, the Social Security Administration (Fraud) Act 1997 introduced a new, more serious form of an offence directed at the making of false declarations etc (Social Security Administration Act 1992, s 111A), which includes a dishonesty element. The mens rea of the less serious offence (s 112 of the 1992 Act) is "knowingly".

³⁹ Working Paper No 104, para 12.4.

PART IV

THE CASE FOR A GENERAL FRAUD OFFENCE

- 4.1 In this Part we first examine the concept of a “general fraud offence”, and distinguish two kinds of offence which are commonly so described. We then consider the advantages which would accrue, or which it is claimed would accrue, from the creation of such an offence. These alleged advantages can be divided into two categories. We consider first the fact that a general fraud offence would extend the substantive coverage of the law. We then consider the possible procedural and presentational advantages of such an offence.
- 4.2 For the purposes of this Part we assume that both dishonesty and deception carry the same meaning as they do in the current law.¹

THE AMBIGUITY OF THE TERM “GENERAL FRAUD OFFENCE”

- 4.3 As we have already noted,² the term “general fraud offence” is commonly used to refer to two quite different kinds of offence.

A general dishonesty offence

- 4.4 On the one hand, the expression denotes an offence based on the legal concept of fraud (or something closely resembling it). That concept has been developed in English criminal law for the purposes of various offences,³ but particularly the common law offence of conspiracy to defraud. Its standard definition was laid down by Viscount Dilhorne in *Scott v Metropolitan Police Commissioner*.⁴

“to defraud” ordinarily means ... to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.

The word “dishonestly” is now construed in accordance with the case law on the interpretation of that word in the Theft Acts. A defendant’s conduct is regarded as dishonest if the fact-finders are satisfied that ordinary people would think it dishonest *and* that the defendant knew that they would.⁵

¹ In the case of the general dishonesty offence, because we consider that the logic of the offence itself broadly so requires (see paras 5.7 – 5.8 below). We consider in Part VIII whether any changes should be made to the legal concept of deception, but for simplicity we ignore this possibility in the present Part.

² Paras 1.12 – 1.14 above.

³ Eg forgery, before the Forgery and Counterfeiting Act 1981 (*Welham v DPP* [1961] AC 103); fraudulent evasion of a Customs and Excise prohibition (*A-G’s Reference (No 1 of 1981)* [1982] QB 848); fraudulently using an excise licence (*Terry* [1984] AC 374); and fraudulent trading (*Grantham* [1984] QB 675).

⁴ [1975] AC 819, 839.

⁵ *Ghosh* [1982] QB 1053; paras 2.9 – 2.11 above.

- 4.5 In the light of this usage, the expression “general fraud offence” is sometimes used to denote an offence consisting simply in fraudulent conduct, within the standard meaning of that concept in English criminal law. In this sense, a person would be guilty of a general fraud offence if he or she did something which, had it been done (or even agreed upon) by two or more people, could have been charged as a conspiracy to defraud – namely, dishonestly depriving a person of something to which that person is (or, but for the defendant’s dishonest conduct, would or might be) entitled. It is in this sense that the Serious Fraud Office appears to favour the creation of a general fraud offence.⁶
- 4.6 Clearly there would be room for some fine-tuning if such an offence were to be enacted, and it might be thought appropriate to exclude certain kinds of conduct which qualify as fraud for the purposes of the existing offences such as conspiracy to defraud. For example, deceiving a person into acting in a particular way can amount to fraud, even if the person deceived suffers no financial loss as a result;⁷ and it might be thought that a general fraud offence should be confined to the infliction of financial loss (or, perhaps, the making of financial gain). But the essence of a general fraud offence based on the existing concept of fraudulent conduct is that, like that concept, it would rely heavily on the requirement of *dishonest* conduct. It would criminalise conduct which is otherwise part of everyday commercial life (namely the obtaining of financial advantages at the expense of others) whenever fact-finders consider that conduct to be dishonest.
- 4.7 In this paper we refer to an offence of this kind as a *general dishonesty offence*. A typical formulation of such an offence is to be found in our 1987 consultative document on conspiracy to defraud:

Any person who dishonestly causes another person to suffer [financial] prejudice, or a risk of prejudice, or who dishonestly makes a gain for himself or another commits an offence.⁸

A general deception offence

- 4.8 However, the term “general fraud offence” is also used in a narrower sense, to denote an offence consisting in the infliction of loss (or, perhaps, *financial* loss) by means of a *particular kind* of fraudulent conduct – namely deception. *Scott* established that, for the purposes of conspiracy to defraud, deception is not required: any dishonest infliction of loss will suffice. A conspiracy to carry out an armed robbery, for example, is clearly a conspiracy to defraud, despite the absence of deception. But in ordinary usage, and indeed in many legal contexts, “fraud” is virtually synonymous with “deception”; and sometimes, when a “general fraud offence” is suggested, that expression is used in the sense of an offence of inflicting loss (or making a gain) *by deception*. Such an offence might *also* require dishonesty; but, if it did, the inclusion of a requirement of deception would make the requirement of dishonesty largely redundant. This would not be a general dishonesty offence in the sense in which we use that term.

⁶ Serious Fraud Office Annual Report 1997–98, p 9.

⁷ *Welham v DPP* [1961] AC 103; *Wai Yu-Tsang* [1992] 1 AC 269.

⁸ Working Paper No 104, para 12.4.

- 4.9 Thus in *Preddy*,⁹ Lord Goff, discussing the legislative history of section 15 of the Theft Act 1968, identified two competing schools of thought on the criminalisation of fraud. One, which resulted in section 15, prefers specific offences. The other was

that there should simply be a general offence of fraud, the essence of which is (broadly speaking) dishonestly deceiving another for the purpose of gain, or (possibly) thereby causing him simply to act to his detriment.

Different common law approaches

- 4.10 Just such a form of general deception offence, as Lord Goff pointed out, exists in the common law offence of fraud in Scotland, which requires merely “the bringing about of some definite practical result by means of false pretences”.¹⁰ A common law offence of fraud which relies on a misrepresentation is also to be found in South Africa,¹¹ and one has recently been discerned in Jersey.¹² The Law Commission of Hong Kong has recently recommended that such an offence, to be called fraud, should be introduced.¹³
- 4.11 On the other hand, in Canada, an offence called fraud was enacted in 1948, and subsequent case law has established that it is essentially a general dishonesty offence, relying purely on deprivation and dishonesty.¹⁴ However, in 1987, the Law Reform Commission of Canada recommended that this offence should be reformulated as a general deception offence.¹⁵

⁹ [1996] AC 815, 830F.

¹⁰ Gerald H Gordon, *The Criminal Law of Scotland* (2nd ed 1978) para 18-01. Gordon goes on to note, however, at para 18-17, that although the Scottish case law indicates that “virtually any practical result is sufficient for fraud it is submitted that the scope of the crime is not as wide as that. The result must be not only practical, it must also involve some legally significant prejudice.”

¹¹ Hunt and Milton, *South African Criminal Law and Procedure* (2nd rev ed, 1989) vol II, p 713.

¹² *A-G v Foster* 1989 JLR 70 (first instance); 1992 JLR 6 (Court of Appeal). At first instance, the court specifically relied on the Scottish and South African law as jurisdictions similar to that in Jersey in having a Roman law foundation.

¹³ Report on Creation of a Substantive Offence of Fraud (1996). The Theft (Amendment) Bill 1998 was introduced in the Legislative Council on 2 December 1998. It implements the report with some amendments: conspiracy to defraud is not abolished, and the scope of the new offence is not limited to financial or proprietary gain or loss.

¹⁴ The offence is now s 380(1) of the Canadian Criminal Code. It is committed by someone who “by deceit, falsehood or other fraudulent means ... defrauds the public or any person ... of any property, money or valuable security or any service.” In *Olan* (1978) 5 CR (3d) 1 it was held that “other fraudulent means” included all means that could be stigmatised as dishonest.

¹⁵ Recodifying Criminal Law (1987) p 81. The existing offence replaced a statutory version of conspiracy to defraud. The recommended offence would criminalise a person who “without any right to do so, by dishonest representation or dishonest non-disclosure induces another person to suffer an economic loss or risk thereof”. No progress has yet been made towards implementing this recommendation.

- 4.12 In New Zealand, a law reform Bill in 1989 proposed re-drafting a pre-existing statutory version of conspiracy to defraud, retaining the element of conspiracy and relying on dishonesty *or* deception. A committee charged with examining the bill recommended two years later that the offence (retaining conspiracy) should rely on deception alone.¹⁶ Following a recent case in which the Court of Appeal concluded that the offence of false pretences in New Zealand could not be applied where what was received was an increase in a credit balance,¹⁷ the New Zealand Law Commission has recommended amending the offence by adding the words “any other privilege, benefit, pecuniary advantage or valuable consideration”, which would make it into a form of general deception offence.¹⁸ At Commonwealth level in Australia, there is an offence, which may be committed by individuals, of defrauding the Commonwealth, as well as a corresponding conspiracy offence.¹⁹

THE SUBSTANTIVE COVERAGE OF A GENERAL FRAUD OFFENCE

- 4.13 We now consider the advantages that, it is said, would flow from the introduction of a general fraud offence. Some of these alleged advantages would apply only to a general dishonesty offence; others would apply equally to a general deception offence. The advantages of either form of offence would of course depend to some extent on its precise formulation. However, since our provisional conclusion in this paper is that either form would be undesirable in principle, in neither case have we attempted to formulate a precise definition. This means that our discussion of the alleged advantages of such an offence must be conducted in general terms. We are concerned to assess the advantages of a particular *kind* of offence.
- 4.14 The most obvious argument for a general fraud offence is that it would criminalise conduct which, though dishonest, is not criminal under the existing law. Here we give some examples of such conduct.²⁰ Everyone would agree that some of these cases ought to be criminal; others are more controversial. It is not our purpose at this stage to put forward a view on the cases in the latter category (though later in this paper we shall make proposals in respect of some of them). Our concern is

¹⁶ Crimes Bill 1989: Report of the Crimes Consultative Committee (1991) p 114. The original statutory offence was s 257 of the Crimes Act 1961.

¹⁷ *Wilkinson* (unreported, 13 October 1998).

¹⁸ New Zealand Law Commission Report 51: Dishonestly Procuring Valuable Benefits (1998).

¹⁹ Crimes Act 1914 (Cth) s 29D and s 86. It would appear that dishonesty, or at least “dishonest means”, are required, but not as defined in *Ghosh* [1982] QB 1053; *Peters* (1998) 72 AJLR 517.

²⁰ These putative gaps in the law include many of those set out in our conspiracy to defraud report. Others have been or will be dealt with in the context of our other work, eg obtaining loans by deception in *Offences of Dishonesty: Money Transfers* (1996) Law Com No 243; confidential information in *Legislating the Criminal Code: Misuse of Trade Secrets* (1997) Consultation Paper No 150; corruption not involving consideration, in *Legislating the Criminal Code: Corruption* (1998) Law Com No 248, and associated work by others; assisting in fraud by third parties in *Assisting and Encouraging Crime* (1993) Consultation Paper No 131. The material discussed under the headings “commercial swindles” and “ignorance of the details of the fraud” in that report relate to presentational rather than substantive issues.

simply to identify the sort of case which, it is said, can best be caught by a general fraud offence.

- 4.15 Whether these cases *would* be caught by a general fraud offence would of course depend on the definition of such an offence. In particular, a general fraud offence based on deception would fail to catch those examples where no deception is involved. But our object is to identify conduct which is not (or arguably is not) criminal *even if it is dishonest*. For example, it is suggested that one such case is the making by a fiduciary of a secret profit at the expense of his or her principal. We do not suggest that fact-finders would necessarily regard such conduct as dishonest in every case; but clearly it is *sometimes* dishonest. Where it *is* dishonest, it may not be caught by the existing law; but it would, by definition, be caught by a general fraud offence based on dishonesty (as distinct from deception). The fact that a general dishonesty offence *automatically* catches all dishonest conduct is said to be an argument for introducing such an offence.

***Preddy* and financial markets**

- 4.16 In *Preddy*²¹ the House of Lords revealed a lacuna in the offence of obtaining property by deception. There is no offence, it was held, where the property obtained by the defendant, though in substance identical to property lost by the victim, is in legal theory distinct from it. The case itself concerned transfers between bank accounts, and in its application to this situation the House's decision was reversed by the Theft (Amendment) Act 1996, which was based on the recommendations in our money transfers report. But, as we explained in Part II,²² it is arguable that the implications of the decision go further, and that similar reasoning might make it impossible to secure a conviction where certain kinds of financial security (such as Eurobonds) are obtained by deception. Obviously this would be an unacceptable state of affairs. If the obtaining by deception of certain kinds of property is not already an offence then clearly the law should be extended so that it is. One way of achieving this objective would be to introduce a general dishonesty offence; another would be to introduce a general deception offence.

Overdrawn bank accounts

- 4.17 A bank account in credit is a debt owed by the bank to the customer. If a defendant dishonestly draws a cheque on another's account, the credit balance of the account is diminished and the defendant is therefore guilty of stealing the other's property. The same is true where, although the bank account is overdrawn, there is an agreed overdraft facility, and thus there is an obligation on the bank (while the agreement subsists) to honour any cheque drawn on the account.²³ Where, however, the bank voluntarily honours the cheque, there being no obligation to do so, as where the account is overdrawn without an overdraft facility

²¹ [1996] AC 815.

²² Paras 2.38 – 2.50.

²³ *Kohn* (1979) 69 Cr App R 395.

or to a greater extent than the facility allows,²⁴ there is no property to be appropriated, and the offence of theft cannot be made out.

- 4.18 While this situation may only occur very rarely where there is not some alternative charge available, its existence causes a significant practical problem in a large number of cases, because the prosecution is required to prove that a bank account was not in a state of unauthorised overdraft at the particular time that the questioned withdrawal took place. In a large and complicated fraud involving numerous bank accounts and complicated transactions, this can be an onerous burden, which can significantly add to the factual complexity with which a jury is faced, and for which it is hard to see any rationale.
- 4.19 Admittedly there could in theory be a conviction for *attempted* theft if it is proved that the defendant presented the cheque in the belief that there was (or might be) a credit balance or an overdraft facility. But the need to prove this is an additional complication which jurors may find hard to understand; and it is no solution if the defendant knew the state of the account, but hoped that the bank would allow it to become further overdrawn. Arguably the defendant's liability should be based on the actual withdrawal of funds – not on whether the bank was obliged to allow them to be withdrawn, nor whether the defendant *thought* it was obliged to do so.
- 4.20 When we addressed the gap in the law revealed by *Preddy*,²⁵ we recommended that the new offence of obtaining a money transfer by deception should cover transfers in which either of the accounts was overdrawn either before or after the money transfer was effected.²⁶ This was duly enacted.²⁷ As a result, this gap in the law is now closed in the case where funds are obtained by deception. But it remains in the case where the defendant uses no deception, but simply withdraws the funds. It is hard to see any moral difference between the two situations: if the former is criminal then, arguably, so should be the latter. A general dishonesty offence would achieve this aim, though a general deception offence obviously would not.²⁸

Breaches of contract

- 4.21 In general the present law does not criminalise mere breaches of contract, however dishonest. A general dishonesty offence would impose liability in situations such as these.

Where property passes without payment of price

- 4.22 In *Edwards v Ddin*,²⁹ the defendant drove into a garage, asked the assistant to fill his petrol tank and then drove off without paying. His conviction for theft was

²⁴ Or where the account is in credit, or the overdraft within the agreed limit, but there is no obligation on the bank to honour the cheque because if it did so the account would become overdrawn or the limit would be exceeded.

²⁵ [1996] AC 815.

²⁶ Money transfers report, para 5.11.

²⁷ Theft Act 1968, s 15A(4)(e), as inserted by Theft (Amendment) Act 1996, s 1.

²⁸ Our proposed solution to this problem is explained at paras 8.17 – 8.23 below.

²⁹ (1976) 63 Cr App R 218.

quashed because property in the petrol passed to him when it was put into his tank, which preceded the alleged act of appropriation, his driving off. He would now commit the offence of making off without payment under section 3 of the 1978 Act;³⁰ but a similar situation could arise wherever the terms of a contract of sale, express or implied, provide for title in the property to pass before the price is paid, and the buyer's dishonesty lies in not paying the price.

Where D is expected (but not legally obliged) to deal with property in a particular way

- 4.23 A person may deal with property in his or her possession in a dishonest way, but not be amenable to prosecution for theft because at the time of the dishonest dealing, the property does not "belong to another". The dishonesty consists in his or her failure to satisfy a *personal* obligation to another, not in any infringement of the other's rights in *property*.
- 4.24 The 1968 Act makes provision for the case where a defendant is legally in possession of property but others have legal rights in relation to it. An infringement of those rights can then be an appropriation of "property belonging to another". Section 5(3) provides:

Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.³¹

Where property is received from another, there is thus a line to be drawn between, on the one hand, those cases in which the property in the defendant's possession is subject to a *legal obligation* that it or its proceeds be dealt with in a particular way; and, on the other hand, those cases where there is a mere *expectation* (or, perhaps, a *moral* obligation) that the property should be so dealt with.³²

- 4.25 In *Clowes (No 2)*,³³ for example, the defendant was convicted of theft after using for his own purposes large sums of money given to him to be invested in Government stocks. The conviction was upheld only after a close examination of the exact terms on which the money was paid to him revealed that he held the funds as a trustee. Had the result of the examination of the basis on which the money was taken been different, and no trust had been discernible, it could be argued that, while a conviction for *theft* would have been precluded, it would have

³⁰ If it could be proved that he never intended to pay for the petrol, he could be convicted of obtaining it by deception. In a self-service petrol station, a person who operated the pump with the intention of making off without payment would be guilty of stealing the petrol by putting it in his tank: *Gomez* [1993] AC 442, para 2.4 above.

³¹ Theft Act 1968, s 5(3). It is a matter of controversy whether s 5(3) adds anything in substance to s 5(1). In principle, it would cover a case in which the obligation on the defendant was purely contractual, there being no trust. The debate is whether or not such a case could exist: see, eg, *Arlidge and Parry on Fraud* (2nd ed 1996) para 3-031; cf A T H Smith, *Property Offences* (1994) paras 4-54 to 4-56.

³² The obligation must be a *legal* one: *Gilks* (1972) 56 Cr App R 734; *Hall* [1973] QB 126; *Wakeman and Farrar* [1974] Crim LR 136.

³³ [1994] 2 All ER 316.

been wrong for Clowes to escape conviction altogether.³⁴ His dealings with the money were (it might be said) dishonest, in that they made it impossible for him to discharge his contractual obligations; and this would still have been so even if the money had, in law, been his to do with as he wished.

Non-payment of debts

- 4.26 Even where the defendant has had no dealings with any property which ever belonged to another, a general dishonesty offence would presumably be capable of criminalising the mere non-payment (or even late payment) of a debt, as long as the fact-finders regarded it as dishonest.
- 4.27 We do not think it necessary in this paper to express a view on whether it would be right to impose criminal liability in such circumstances. For present purposes the point is that, under any formulation of a general dishonesty offence (though not a general deception offence) that we can envisage, such conduct would automatically be criminal if the fact-finders thought it dishonest. For those who believe that all dishonest conduct should be criminal, this is an advantage of a general dishonesty offence.

Breaches of fiduciary duty

- 4.28 A particular area in which there is no property belonging to another is where an employee or fiduciary makes a secret profit by using his position, and dishonestly omits to account for it. In *Attorney-General's Reference (No 1 of 1985)*³⁵ it was held that the employer or beneficiary has no *proprietary* interest in the secret profit, and so there is no property belonging to another. In that case, a public house manager employed by a brewer bought and secretly sold his own beer, in contravention of his contract, without committing theft. As in the situation exemplified by *Clowes (No 2)*,³⁶ under the current law, liability for theft is determined by the civil law question of whether or not the secret profit is held on trust for the beneficiary. The answer to that question remains uncertain. In *Attorney General for Hong Kong v Reid*³⁷ the Privy Council declined to follow the English authority of *Lister and Co v Stubbs*,³⁸ which had been relied on in *Attorney-General's Reference (No 1 of 1985)*,³⁹ and held that the fiduciary did hold the secret profit (in that case, a bribe) on a constructive trust for the beneficiary.

³⁴ Conviction, that is, in respect of his dishonest use of what, ex hypothesi, was *his* property, albeit obtained from customers. It is worth noting that he was also convicted of eight offences of making a false statement to induce investment (presumably contrary to Financial Services Act 1986, s 47). Deceiving the victims into parting with their money would appear to be the more natural way of charging the essence of the fraud. The decision not to charge him with obtaining property by deception may have been taken in anticipation of the lacuna revealed by *Predy* [1996] AC 815, or for some other technical reason.

³⁵ [1986] QB 491.

³⁶ [1994] 2 All ER 316.

³⁷ [1994] 1 AC 324.

³⁸ (1890) 45 Ch D 1.

³⁹ [1986] QB 491.

- 4.29 Were a general dishonesty offence to be introduced, it would be immaterial whether or not the loser had any proprietary interest in the property: it would be sufficient that the defendant had dishonestly made a gain which otherwise might have gone to another.

Non-disclosure

- 4.30 A deception, for the purposes of the deception offences in the Theft Acts, can be effected by conduct as well as words,⁴⁰ but not, it appears, by mere non-disclosure of a material fact, except, possibly, where there is a duty to disclose the fact.⁴¹ This is, however, an area not well covered in the cases, if for no other reason than that the courts have nearly always found it possible to construct an implied representation from conduct. For instance, in *DPP v Ray*,⁴² the defendant and his companions ordered and ate a meal at a restaurant, intending to pay. They then decided not to pay and waited for ten minutes for the waiter to leave the dining room before running away.⁴³ One of the Crown's arguments was that Ray had deceived the waiter by omitting to correct his initial representation implied by ordering that payment would be made for the meal.⁴⁴ The majority in the House of Lords appears to have based its decision, however, on there being a *continuing* representation, which became false when Ray changed his mind about paying. Since whatever acts were required to discontinue the otherwise continuing representation would presumably be the same as whatever would be required to correct an initial, one-off representation, it is difficult to see the logical distinction between the two analyses.
- 4.31 Thus it appears that the law is to a degree uncertain, and in any event liable to rely upon artificiality, with the consequential danger of misunderstanding by juries or justices. A general dishonesty offence would catch all dishonest non-disclosure resulting in loss. Whether such conduct should be part of the law of deception is considered below.⁴⁵

Credit, debit and cheque cards

- 4.32 Where payment is made with a debit or credit card, or with a cheque supported by a cheque guarantee card, and the relevant conditions are fulfilled, liability for the price is fixed on a third party (the credit card provider or bank). Following *Gomez*,⁴⁶ it is possible to charge the obtaining of property by the use of such instruments as theft (although it hardly provides an appropriate label), but theft is confined to the appropriation of *property*. It is usually charged as a deception

⁴⁰ Theft Act 1968, s 15(4).

⁴¹ *Firth* (1990) 91 Cr App R 217; see para 8.60 below.

⁴² [1974] AC 370.

⁴³ He was convicted of obtaining a pecuniary advantage by deception, contrary to Theft Act 1968, s 16(1), before that section was reformed by the Theft Act 1978. The Divisional Court overturned the conviction and the DPP appealed to the House of Lords. Ray would now be guilty of making off without payment: Theft Act 1978, s 3(1).

⁴⁴ [1974] AC 370, 374A–H.

⁴⁵ Paras 8.59 – 8.65.

⁴⁶ [1993] AC 442.

offence. While the eight deception offences in the Theft Acts⁴⁷ range wider than property in defining the benefits which may be obtained, the description of the use of cheque or credit cards to dishonestly obtain, say, services by *deception* is at least problematic, and even if acceptable in principle can lead to undeserved acquittals. A general dishonesty offence would obviate these problems. Whether they would be covered by a general deception offence would depend upon how such an offence is drafted. The current law of deception has striven to include this situation, and it would be possible to preserve the notion of “deception” required for this result. An alternative is the creation of a new, specific offence. This question is discussed further in Part VIII below.⁴⁸

Misuse (“deception”) of computers and other machines

- 4.33 Where property is obtained by the misuse (or, loosely, “deception”) of a machine, it is theft.⁴⁹ Where that which is obtained is, say, a service, it is not theft, and would not appear to be obtaining by deception. As a matter of English usage, true deception requires a human mind to be deceived. It would be covered by a general dishonesty offence. The question of whether the notion of deception should be extended to include such misuse, for the purpose of the existing deception offences or a general deception offence, is discussed in Part VIII below.⁵⁰

No intention to cause *permanent loss*

- 4.34 The dishonest appropriation of property belonging to another is theft only if it is done with the intention to deprive the other of it permanently.⁵¹ The offence of obtaining property by deception has a similar requirement.⁵² When a debtor by deception (and dishonestly) induces a creditor to wait for payment, he commits an offence, but only if he or she intends to make permanent default (in whole or in part) on the debt.⁵³ A person who makes off without payment intending to avoid payment of the amount due commits an offence⁵⁴ if he or she intends *never* to pay, but not if his or her intention is merely to *delay* payment.⁵⁵ It can be said, therefore, that the inclusion of such a requirement is part of the general policy of the Theft Acts. Although there is no similar requirement in relation to the other deception offences, that is presumably because it simply does not make sense to apply it to the obtaining of a service or a money transfer,⁵⁶ the remission of a debt, and so on.

⁴⁷ See paras 2.13 – 2.26 above.

⁴⁸ See paras 8.8 – 8.32.

⁴⁹ See *Goodwin* [1996] Crim LR 262 for a recent example.

⁵⁰ See paras 8.36 – 8.58.

⁵¹ Theft Act 1968, s 1(1).

⁵² Theft Act 1968, s 15(1).

⁵³ Theft Act 1978, s 2(1)(b).

⁵⁴ Theft Act 1978, s 3(1).

⁵⁵ *Allen* [1985] AC 1029.

⁵⁶ The inherent inapplicability of the notion to money transfers was one of our reasons for rejecting the option of extending the existing s 15 offence to close the gap revealed by *Preddy* [1996] AC 815: see our money transfers report, paras 4.9 – 4.10.

For the same reason, such a requirement would presumably not form part of a general fraud offence.

Conclusions

- 4.35 The effect of this discussion is that in *some* areas a desirable extension of the criminal law could be brought about by either form of general fraud offence. The clearest example is the avoidance of what we have called the *Preddy* problem in financial markets, and we have suggested some other cases which are perhaps more debatable. However, in each case the reform that is said to be desirable could just as readily be achieved by a less radical amendment to the existing law. The *Preddy* problem, for example, could be met by a simple amendment to section 15 of the 1968 Act.⁵⁷ The requirement of an intention permanently to deprive could simply be removed from those offences that include it.⁵⁸ Clearly, it can be claimed as an advantage of a general fraud offence that it would criminalise all dishonest conduct. But the existence of *some* dishonest conduct which is not criminal does not in itself justify the creation of a general fraud offence, because any *particular* case can be brought within the law by means of a more limited reform. The case for a general dishonesty offence has to rest on the argument that *all* dishonest conduct should in principle be criminal. We consider that argument in Part V below.

EFFECTIVE PROSECUTION

- 4.36 We now turn to a quite different kind of argument for a general fraud offence. Such an offence is said to be particularly conducive to effective prosecution, for reasons that are essentially procedural and presentational. Our assessment of these alleged advantages draws heavily on the experience of conspiracy to defraud, in respect of which similar advantages have been claimed. From our earlier consultation exercise on Working Paper No 104, it was clear that it was on these advantages that the prosecutors we consulted put particular stress. These are advantages which rely on the fact that a general fraud offence brings together under one roof all or most of the existing relevant offences, rather than relying on any substantive extension to the law.

Expressing the criminality

- 4.37 Accurately to represent the conduct that the prosecution is really saying is criminal is the purpose of a criminal charge. Particularly in large scale frauds, that will usually be a complex fraudulent scheme taken as a whole, rather than particular instances of wrongful conduct, which could be charged as particular substantive offences. The particular instances may be merely incidental to the main scheme, may have different victims to those the whole scheme is really aimed at, or may have a number of equally important limbs. One consequence of this, it is said, is that under a general fraud offence (especially a general dishonesty offence) the prosecution's task⁵⁹ of explaining the fraud to the jury is made much easier. The fraudulent scheme *is* the core of the offence. Where particular substantive offences

⁵⁷ See paras 7.4 – 7.7 below.

⁵⁸ See paras 7.8 – 7.30 below.

⁵⁹ And that of the judge in summarising the evidence in his or her summing-up.

are charged, the prosecution must first explain the fraudulent scheme, and then separately explain how the particular offences fit into the scheme as a whole. This may be a rather artificial process.

- 4.38 Another argument is that the roles of a number of different actors can best be assessed in the context of a trial for a general fraud offence. In our conspiracy to defraud report, we recorded the concern of some prosecutors that the abolition of conspiracy to defraud would make it harder to secure the conviction of those on the periphery of complex frauds. We expressed some doubts as to whether the existing law on aiding and abetting was as inadequate for this purpose as is sometime suggested,⁶⁰ and we hope to consider such matters in our forthcoming report on assisting and encouraging crime. Nevertheless, even if those on the periphery of the scheme may be found guilty of secondary liability for what may be incidental particular offences, it is arguably more desirable, in terms of both explanation and sentencing, for their involvement to be expressed as part of the overall scheme.

Overloading the indictment

- 4.39 A fraud may consist of a course of conduct, the criminal content of which, in the absence of a general fraud offence, may amount to numerous individual thefts or obtainings of property by deception which taken individually are comparatively minor, but when added together amount to very serious crime. In *Bradshaw*,⁶¹ for instance, the defendant had defrauded investors of up to £3 million. To have charged the full extent of the fraud as individual counts of theft would have required 138 counts. In such circumstances, the prosecutor may face real difficulties in drafting an indictment that properly covers the criminality. In *Bradshaw*, the defendant was convicted of five counts of theft amounting to £97,000, and the Court of Appeal upheld a sentence reflecting the full amount, on the basis that the five counts were specimen counts representing the total defrauded in the scheme as a whole. However, the Court of Appeal has now made it clear that sentencing on specimen counts is contrary to principle,⁶² thus removing an important part of the prosecutor's armoury in such cases.
- 4.40 In such circumstances, it would be open to the prosecutor to charge conspiracy to commit the substantive offence if there were evidence of agreement and more than one person were involved.⁶³ This can provide its own difficulties, however, where the series of offences are of different kinds. Although it is possible to charge a conspiracy covering more than one substantive offence, such a charge can be unwieldy and creates its own problems.⁶⁴ As a general rule, it appears that it is a course of action that prosecutors tend to avoid. We referred in our conspiracy to defraud report to an example put to us by the Serious Fraud Office of a single transaction which involved the procuring by deception of the transfer of funds in

⁶⁰ Our conspiracy to defraud report, para 4.71.

⁶¹ [1997] Crim LR 239.

⁶² *Canavan* [1998] 1 Cr App R 79.

⁶³ *Bradshaw* could not be charged with conspiracy to steal for procedural reasons.

⁶⁴ See, eg, *Roberts* [1998] 1 Cr App R 441.

the form of both cash and stock from two different pension funds.⁶⁵ To charge substantive offences would have required four counts, all of specific deception offences.

Admissibility of evidence

- 4.41 If charged as a general fraud offence, the whole of a fraudulent scheme would be relevant to the offence, and the admission of evidence of any or all aspects of the scheme would be straightforward. In the absence of a general dishonesty offence or conspiracy to defraud, it may be that some pressure for the overloading of an indictment comes from the fear that if the full range of transactions which make up a complex fraud are not reflected in individual counts, cogent evidence relating directly only to un-charged transactions will be inadmissible, or admissible only on the possibly uncertain basis of the “similar fact” principle. While we have not been made aware of particular complaints of problems with the admission of evidence in complex frauds, this may be in part because of the expansion of the idea of “background” evidence, which is open to the criticism that it erodes a principled approach to relevance and admissibility.⁶⁶

Do these considerations justify a general fraud offence?

- 4.42 Our provisional view is that these are valid concerns: provided that the defendant is given adequate particulars of what is alleged, we think it desirable that prosecutors should be able to encapsulate a complicated fraud within a single count. But we would question whether this is a good argument for creating a general fraud offence. Our doubts on this point are twofold. In the first place, the creation of a general fraud offence would not *in itself* reduce the number of charges required. The law might provide that it is an offence to cause loss dishonestly, but that every dishonest causing of loss is a separate offence and must be charged in a separate count. A general fraud offence is therefore not *sufficient*.
- 4.43 Secondly, and conversely, a general fraud offence is not *necessary* for this purpose either: it may be possible to achieve the desired result without such an offence. Indeed, to some extent that is already the case. On a charge of conspiracy to defraud (often advanced as the model for a general fraud offence) the prosecution need not confine themselves to one instance of criminality: they can charge the most complicated of frauds in a single count. In theory this does not contravene the rule against charging more than one offence in a count (“duplication”), because in theory the offence is the conspiracy, rather than the things done in pursuance of the conspiracy. But the effect is that a dishonest scheme involving many separate offences can be charged as one offence, provided that there is more than one participant.⁶⁷ The same result can be achieved on a charge of fraudulent trading, which is a continuing offence and can therefore be charged in relation to a

⁶⁵ Our conspiracy to defraud report, para 5.12.

⁶⁶ For a discussion of background evidence, see Evidence in Criminal Proceedings: Previous Misconduct of a Defendant (1996) Consultation Paper No 141, paras 2.70 – 2.84.

⁶⁷ For an example of such a count with full particulars, see the model indictment suggested by the Court of Appeal in *Landy* [1981] 1 WLR 355.

continuing course of fraudulent conduct.⁶⁸ If the rule allowing the prosecution to do this is thought to be a desirable one, it might be extended to other fraud offences such as those of deception. How this might be done is an issue to which we return in Part VII. The task would not be without difficulty. But the difficulties would in our view be no greater than those involved in seeking to achieve the same objective through the medium of a general fraud offence.

- 4.44 In our provisional view, therefore, the introduction of a general fraud offence is neither necessary nor sufficient to achieve this kind of essentially procedural reform; and, even if it is agreed that such a reform would be desirable, that fact would therefore not justify us in proposing such an offence.

⁶⁸ For example, in *Smith (Wallace Duncan)* [1996] 2 Cr App R 1 a count of fraudulent trading charged that “Wallace Duncan Smith between 1st May 1990 and 29th April 1991 was knowingly a party to the carrying on of the business of Wallace Smith Trust Co Limited with intent to defraud creditors of the said Company”.

PART V

THE CASE AGAINST A GENERAL DISHONESTY OFFENCE

- 5.1 In this Part, we consider the arguments against the introduction of a general fraud offence based on the element of dishonesty. We begin with some preliminary observations on the role of the dishonesty element in such an offence, concluding that it would necessarily be a *positive* dishonesty element and would therefore have to be left undefined. We point out that the test laid down in *Ghosh*¹ is not the only possible way of interpreting an undefined positive dishonesty element, but that the obvious alternative would have all the same drawbacks. We then proceed to assess those drawbacks, and conclude that they are too serious to justify the creation of a general dishonesty offence. Finally we consider whether, in the light of our analysis, a general dishonesty offence would fulfil the standards of certainty in the law required by the ECHR.

THE ROLE OF DISHONESTY IN A GENERAL DISHONESTY OFFENCE

Dishonesty must be a positive element

- 5.2 In Part III, we drew a distinction between dishonesty as a positive element and as a negative element in offences. It is in the nature of a general dishonesty offence that dishonesty should be a positive element. If the offence is to be a *general* offence, the conduct elements required must be kept to a minimum: the offence must be capable of catching conduct (such as the causing of loss or prejudice to others) which, in a competitive society, is not *prima facie* wrongful. And it follows that the task of distinguishing between what is and what is not criminal must fall almost entirely on the element of dishonesty. We must therefore consider whether this would involve placing greater reliance on that element than it can reasonably bear. This issue is one of substance, not merely one of drafting. The SPTL criticised the general fraud offence proposed in our Working Paper No 104² on the basis that it gave dishonesty too central a role, and offered their own formulation:

By deception, improper concealment or other fraudulent means intentionally or recklessly [to cause] another to suffer prejudice or risk of prejudice.

But subsequent discussions³ suggested that this definition was subject to essentially the same objection.⁴

¹ [1982] QB 1053.

² See para 4.7 above.

³ As part of our assessment of the consultation, a meeting was held on the alternative formulations between the Commission and Professors J C Smith, Edward Griew and Ian Dennis. Although not formally representing the SPTL, the professors agreed with this assessment.

⁴ The definition was partly based on the offence of fraud in s 380(1) of the Canadian criminal code, and in Canada “other fraudulent means” had been defined to mean “dishonestly”: *Olan* (1978) 41 CCC (2d) 145, 149. Such an interpretation would have to be

- 5.3 It may perhaps be argued that the dishonesty element of a general dishonesty offence *need* not be a positive element: it would depend how the offence was formulated. The more narrowly the other elements of the offence are defined, the less clear it is that the dishonesty element is a positive one; but, equally, the less clear it is that the offence can be described as a general dishonesty offence at all. For example, if a general *deception* offence included an element of dishonesty, we would indeed regard that as a negative element, because causing loss by deception is conduct that one might reasonably expect to be criminal; but, by the same token, a general deception offence, even if it included an element of dishonesty, would not be what we mean by a general dishonesty offence.
- 5.4 Admittedly it might be possible to envisage an offence whose non-dishonesty elements are sufficiently unspecific for it to be regarded as a general dishonesty offence, while still being *prima facie* wrongful at some level. For example, it might be made an offence to cause loss by dishonest conduct which is wrongful as a matter of civil law.⁵ This could be described as a general dishonesty offence; but it might be argued that conduct amounting to a civil wrong is by definition wrongful, and that in such an offence dishonesty would therefore be a negative element. But this would be a somewhat mechanical application of the distinction we propose, out of keeping with its spirit. We would not agree that an offence in these terms could fairly be regarded as one of negative dishonesty, because the requirement of a civil wrong would be far too easily satisfied to relieve the dishonesty element of much of the burden that would otherwise rest upon it. The failure to pay a debt on the due date may be wrongful in one sense, but it is not the sort of conduct that one would expect to be *prima facie* criminal. The obtaining of benefits by deception is nearly always dishonest; the late payment of debts usually is not. An offence under which the latter could be criminal, if it were regarded as dishonest, would therefore place almost as much reliance on the requirement of dishonesty as would an offence of “dishonestly causing loss”. We find it impossible to envisage an offence which might fairly be described as a general dishonesty offence, but of which this would not be true. Indeed, it seems to us to be in the nature of a general dishonesty offence (in the sense in which we use that term) that it *should* be true.

Dishonesty must be undefined

- 5.5 In the case of some offences (for example, those of deception) dishonesty is what we have called a “negative” element. It serves essentially as a *defence*, enabling a defendant to escape liability for conduct which is *prima facie* wrongful. In these cases it can be defined in such a way that its existence is negated – in other words,

followed in England if, as the SPTL intended, the offence were sufficiently wide to cover the conduct complained of in both *Scott v Metropolitan Police Commissioner* [1975] AC 819 and *Hollinshead* [1985] AC 975: see paras 2.26 – 2.30 above.

⁵ Cf paras 5.29 – 5.31 below, where we discuss the possibility of confining a general dishonesty offence to conduct which is *actionable* (that is, which gives rise to a remedy in civil law). The dishonesty element of such an offence would be more clearly a positive element than in the case of an offence requiring *wrongful* conduct, because some conduct is actionable but not wrongful – eg conduct giving rise to a remedy in restitution. Our argument is that conduct cannot be regarded as *prima facie* criminal merely because it amounts to a civil wrong; a fortiori if it is not even a civil wrong, but merely *remediable* in civil law.

the defendant's conduct is regarded as *not* dishonest – only in certain narrowly-defined circumstances. Since a negative element of dishonesty serves *only* to excuse conduct which is *prima facie* unlawful, as distinct from determining whether conduct is unlawful in the first place, the concept of conduct which is *not* dishonest (and therefore not criminal) can be confined to specific cases (such as claim of right) where liability is thought to be unjustified. In English law, it is not at present so confined;⁶ but it is perfectly feasible that it should be. Indeed, as we have seen,⁷ this was clearly the intention of the CLRC. The word “dishonestly” was designed to do little more than preserve the old defence of claim of right.

- 5.6 Where dishonesty serves as a positive element, however (as in the case of a general dishonesty offence), this approach is not available. The law cannot say that it is an offence to cause loss dishonestly, and that causing loss is dishonest except in certain defined circumstances: clearly this would cast the net of criminal liability far too wide. Where the conduct elements of an offence are morally neutral, the element of dishonesty has to do more than simply exclude specific types of conduct which, though *prima facie* wrongful, do not deserve to be criminal. Conduct which is *not* *prima facie* wrongful may nevertheless suffice for the conduct elements of the offence, and it is *only* by finding it to be non-dishonest that it can be categorised as non-criminal. It follows, in our view, that the circumstances in which such conduct may be found to be non-dishonest cannot be circumscribed by legal definition. Where dishonesty is a positive element, it *must* be open to the fact-finders to find that particular conduct is not dishonest, even if the legislation does not say so. **We provisionally conclude that, for the purposes of a general dishonesty offence, the element of dishonesty would have to be left undefined.**⁸

AN ALTERNATIVE TO THE *GHOSH* TEST

- 5.7 This conclusion does not necessarily mean that the dishonesty element of a general dishonesty offence would have to take precisely the form described in *Ghosh*. In that case, as we have seen, the Court of Appeal laid down a two-stage test for the determination of the dishonesty issue: conduct is to be regarded as

⁶ In the Australian state of Victoria, which has the same law of theft as England and Wales, the courts have confined dishonesty to the matters set out in their equivalent of section 2(1) of the 1968 Act: *Salvo* [1980] VR 401; *Brow* [1981] VR 783; *Bonollo* [1981] VR 633. In the Australian Capital Territory, an alternative definition of dishonesty includes a provision based on a dictum of McGarvie J in *Bonollo*. A defendant who believes that his or her appropriation of property “will not thereby cause any significant practical detriment to the interests of the person to whom the property belongs in relation to that property” is deemed not to be dishonest: Crimes Act 1900 (NSW), s 96(4)(b) – a provision inserted into the 1900 Act as it applies to the Australian Capital Territory by the Crimes (Amendment) Ordinance (No 4) 1985 (ACT). It has been argued by Professor DW Elliott that a similar definition should be introduced in English law: “Dishonesty in Theft – A Dispensable Concept” [1982] Crim LR 395.

⁷ Paras 3.3 – 3.7 above.

⁸ That is not to say that there could be no guidance as to how the fact-finders should approach the issue of dishonesty. *Ghosh* provides such guidance, and other approaches may be possible. But *Ghosh* does not tell the fact-finders what conduct they should and should not regard as dishonest: it tells them to apply the standards of ordinary people instead. This is not so much a definition as a way of coping with the absence of a definition.

dishonest if the fact-finders think that ordinary people would so regard it *and* are satisfied that the defendant knew that ordinary people would so regard it. The second limb of this test was introduced in *Ghosh*, and is not indispensable. It would be possible to regard conduct as dishonest if ordinary people would think it dishonest, whether or not the defendant realised that they would think so. This purely “objective”⁹ approach appears closer to what the Court of Appeal had in mind when, in *Feely*,¹⁰ it rejected the idea that conduct attracting no moral obloquy can nevertheless be dishonest within the meaning of the 1968 Act. It may also be compared with the approach adopted by the civil law in the context of the liability for dishonest assistance in a breach of trust. In this context it has been said that dishonesty is not acting as an honest person would in the circumstances, or acting in a way which is “commercially unacceptable conduct in the particular context involved”.¹¹ It is a purely objective standard.¹²

- 5.8 It is debatable whether the *Ghosh* test is preferable to the test adopted in *Feely* and (albeit for different purposes) in the civil law. The only apparent function of the second limb of the *Ghosh* test is to allow a defendant to escape liability on the basis of a mistake of fact about what the general standard of honesty is; and it is questionable whether this function is a useful one. It is not self-evidently important to ensure a person’s acquittal merely because he or she does not understand the moral beliefs held by the rest of society. For present purposes, however, we believe that the similarity between these two approaches is of far more importance than the difference between them. In both cases it is their assumption of, and dependence on, a shared moral standard that leaves them open to criticism as determinants of criminal liability. Indeed, one objection to a general dishonesty offence based on the *Ghosh* test is that it might result in the conviction of persons whose conduct is morally blameless, and discarding the second, “subjective” limb could only *increase* this risk. This point aside, our provisional view is that the criticisms of the *Ghosh* test discussed in this Part would be equally applicable to a more “objective” test of dishonesty, as long as such a test required the application of prevailing moral standards as distinct from legal definitions. For the sake of simplicity, therefore, we shall refer to criteria of this kind as “*Ghosh* dishonesty”.

CRITICISMS OF DISHONESTY AS A POSITIVE ELEMENT

- 5.9 The argument for using *Ghosh* dishonesty as a determinant of criminal liability may be summarised in the words of the CLRC (though they clearly did not foresee the implications of the change they proposed):

“Dishonestly” seems to us to be a better word than “fraudulently”. The question “was this dishonest?” is easier for a jury to answer than the question “was this fraudulent?”. “Dishonesty” is something which

⁹ Objective, that is, by comparison with the *Ghosh* test. But we question whether a criterion based on undefined moral standards can properly be described as objective at all, with or without reference to the defendant’s perception of those standards.

¹⁰ [1973] QB 530.

¹¹ *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389, *per* Lord Nicholls.

¹² *Ibid*; *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* (Carnwath J) unreported, 18 December 1998.

laymen can easily recognise when they see it, whereas “fraud” may seem to involve technicalities which have to be explained by a lawyer.¹³

On this view, benefits flow from the fact that a jury consists of a number of people with different views, and that, if they are not in agreement on a sole standard of dishonesty, a decision will be arrived at by discussion and compromise between them. In a diverse society it is beneficial to use a flexible concept to decide whether or not an activity is criminal.

- 5.10 In this section we examine some drawbacks of *Ghosh* dishonesty, and attempt to assess whether they outweigh these advantages. For the most part our criticisms of *Ghosh* dishonesty as a determinant of criminal liability are equally applicable whether it serves as a positive or a negative element;¹⁴ but they are stronger in the former case (for example, in relation to *Ghosh* dishonesty as an element of a general dishonesty offence) because in this case dishonesty plays a greater role. If it is unacceptable that the criminality of prima facie wrongful conduct should depend on undefined moral standards, this is all the more unacceptable in the case of conduct which is not even prima facie wrongful.

An unusual kind of requirement

- 5.11 The *Ghosh* approach requires fact-finders to set a moral standard of honesty and determine whether the defendant’s conduct falls short of that standard. The argument in *Feely* (which first laid down the approach developed in *Ghosh*) is that this is a purely *semantic* enquiry: “dishonestly” is an ordinary English word, and, as presumably competent users of English, fact-finders can be expected to know what it means. But it is also a *moral* enquiry, and requires the making of a moral judgment.¹⁵ To say that something is dishonest is to characterise the existing facts, not add another fact.¹⁶ This, we believe, is an unusual kind of requirement in English criminal law. Traditionally, offences consist of objectively defined conduct (or circumstances, or events) and mental states (or other fault elements, such as negligence), subject to objectively defined circumstances of justification or excuse (such as self-defence or duress). In general the fact-finders’ task is to determine whether the defendant’s conduct falls within the legal definition of the offence, not whether they think it sufficiently blameworthy to be an offence. A requirement that the conduct in question fall short of an undefined *moral* standard is out of keeping with this approach.

¹³ CLRC Eighth Report, para 39.

¹⁴ For the distinction, see paras 3.12 – 3.17 above. For our provisional conclusions on the role of *Ghosh* dishonesty as a negative element in the law of deception, see paras 7.39 – 7.53 below.

¹⁵ Professor Griew, in “Dishonesty: the Objections to *Feely* and *Ghosh*” [1985] Crim LR 341, makes the point that many jurors (“ordinary dishonest jurors” – his criticism A6) may demand of defendants a higher standard than they impose on themselves in their ordinary, mildly dishonest, everyday lives. This, he argues, is disreputable “creative hypocrisy”. It does not undermine our point: a hypocritical judgment is necessarily also a moral judgment (albeit a flawed one).

¹⁶ But the jury may choose to take into account any number of other factual matters, the limits to the enquiry being indeterminate.

- 5.12 It is true that fact-finders often have to make judgments on matters of degree. Driving, for instance, becomes an offence if it falls below a certain level of competence or diligence. But dangerous driving is defined by statute in terms which render it a factual question,¹⁷ and the same is true of careless driving as a matter of case law.¹⁸ Thus, in these offences, the role of the fact-finders is to determine whether the defendant's conduct falls below a legally defined standard.¹⁹ They are not required to decide whether conduct which does fall below that standard is sufficiently blameworthy to be criminal.
- 5.13 A closer analogy to *Ghosh* dishonesty, perhaps, is gross negligence manslaughter. The law requires the jury to determine whether the defendant's conduct was careless enough to be criminal, but does not tell them how careless it needs to be.²⁰ It therefore requires the jury not just to *apply* a standard, but also to *set* it.²¹ Arguably this is no different in principle from the kind of enquiry required by *Ghosh*. But in one sense it is more objective, because the riskiness of a person's conduct is more quantifiable than its dishonesty. Given enough facts, risk can be mathematically assessed: the relative dangerousness of different forms of conduct is at bottom a question of fact. A 30% risk of death is greater than a 10% risk. In the case of dishonesty, however, even this degree of objectivity does not exist. Dishonesty is not quantifiable, even in theory. The relative blameworthiness of (say) minor theft from an employer and failure to disclose part of one's income to the tax authorities is *entirely* a matter of opinion. The fact-finders are required not merely to place the defendant's conduct at an appropriate point on the scale, but to construct their own scale.
- 5.14 We suggest, therefore, that the task allocated to juries and magistrates by the *Ghosh* test is a very unusual one.²² It is as if juries were directed, in relation to the defence

¹⁷ Road Traffic Act 1988, s 2A: "(1) ... a person is to be regarded as driving dangerously if ... (a) the way he drives falls far below what would be expected of a competent and careful driver, and (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous ... (3) ... 'dangerous' refers to danger either of injury to any person or of serious damage to property ...".

¹⁸ *Taylor v Rogers* [1960] Crim LR 270; *Scott v Warren* [1974] RTR 104.

¹⁹ In the case of dangerous driving, the setting of the standard is a two-part process. The jury's task can be described in these terms as requiring them first to determine what constitutes driving to a reasonable standard, then at what point below that level driving can be regarded as *far* below the standard, and finally whether the defendant's driving was above or below that lower level.

²⁰ *Adomako* [1995] 1 AC 171; *Bateman* (1925) 19 Cr App R 8.

²¹ In *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237 we recommended the replacement of this form of manslaughter with a statutory offence of killing by gross carelessness, broadly based on the definition of dangerousness in driving: see para 5.34.

²² Richard Tur, in "Dishonesty and the jury" in A Philips Griffiths ed, *Philosophy and Practice* (1985) p 75, defends the approach in *Feely* and *Ghosh*, claims that dishonesty is but an example of a moral standard-bearing concept, and offers two other examples – "immoral purposes" in the Sexual Offences Act 1956 and the common law concept of a "disorderly house". Both relate to comparatively minor offences; and the statutory offence does not use the moral concept to criminalise behaviour directly, but rather criminalises the solicitation of the immoral behaviour. Nevertheless, it must be agreed that both are "at large" moral terms.

of self-defence: “It is for you to decide whether the defendant’s response to the force used by the victim was justified or not. ‘Justified’ is an ordinary English word, which you must define and apply for yourselves.” Some juries would apply the same standard that the law now applies. Others might adopt a pacifist position and say that no force was justified, even in self-protection. Others again might consider that, having started the fight, the victim deserved a good beating. And there would be no way of rationally adjudicating the competing moral outlooks revealed.²³

Inconsistency

- 5.15 That like circumstances should be treated alike is fundamental to fairness and the rule of law. The result of our analysis of dishonesty is that the use made of the concept in the law must result in endemic inconsistency.
- 5.16 Central to *Feely* and *Ghosh* is the insistence that “dishonesty” is an ordinary English word. But even if it is an ordinary word in the English language, there is no guarantee that all speakers of the language will agree as to its application, particularly in marginal cases. As Professor Griew pointed out, “Even judges, a relatively homogeneous group of uniformly high linguistic competence, have been known to differ on the application of the epithet ‘dishonest’ in a marginal case”.²⁴ Individuals can reasonably differ in the application of a word. The point of the paraphrase provided by a definition is to bring users of the word together. Where the law defines a term, the process goes further: the meaning is, for the purposes of the provision, prescribed. Thereafter, any divergence in application from the prescribed meaning is an error. But fact-finders considering dishonesty are given no such assistance.
- 5.17 The test in *Ghosh* provides a way for fact-finders to apply the “ordinary standards of reasonable and honest people”, presumably by applying their common understanding of the word. But this amounts to an appeal to a unified conception of honesty which we do not think is workable in modern society.²⁵ We live in a heterodox and plural society which juries (and to a lesser extent magistrates)²⁶

²³ In *DPP v Armstrong-Braun*, *The Times* 26 October 1998 (sub nom *DPP v Braun*), the Divisional Court rejected a submission, clearly modelled on *Ghosh*, that a defendant should be acquitted if he honestly believed that the community would regard the level of force he used in self-defence as acceptable. It would amount to “a peculiar and artificial inquiry”.

²⁴ Griew, “Dishonesty: the objections to *Feely* and *Ghosh*” [1985] Crim LR 341, 345 (his criticisms A2 and A4). Professor Griew refers to *Sinclair v Neighbour* [1967] 2 QB 279. The facts of the case were identical to those of *Feely*, save that the manager of the bookmaker did in fact replace in the till the money he borrowed. He sued his employer for wrongful dismissal. In the county court, the judge held for the plaintiff on the basis that his conduct was reprehensible and improper, but not dishonest. Allowing the appeal, the Court of Appeal found that even if his conduct might not have been dishonest, it was sufficient to justify dismissal.

²⁵ The point is directly behind Professor Griew’s criticisms A3 (“Fiction of community norms”), A4 (“‘Dishonesty’ as an ‘ordinary word’”) and A7 (“‘Anarchic’ verdicts”): *op cit*. To an extent the same may be true of B6 (“A further threat to standards”), although an argument could be made to the opposite effect.

²⁶ The composition of the magistracy may be more homogeneous than that of juries; but the kind of fraud at which a general dishonesty offence would be aimed is normally tried by a jury.

presumably replicate. To assume that there is a single community norm or standard of dishonesty, discernible by twelve (or even ten) randomly selected people of any age between 18 and 65, and of widely varied class, cultural, educational, racial and religious backgrounds, is unrealistic. How juries cope with these problems we cannot tell, given the prohibition on research into jury discussions.²⁷ It seems inconceivable, however, that different juries do not come to different decisions on essentially similar facts. These are not *perverse* verdicts, because individually they are the result of the jury correctly applying the law. Such verdicts have been described as “anarchic”, because they are the result of the jury being asked “a question of moral estimation without guidelines”.²⁸

- 5.18 In actually applying the *Ghosh* test, fact-finders may consider matters which, in the case of other offences, would not be matters properly relevant to guilt. These include motive, pressure of circumstances or even good character. It may be objected that these do not, or should not, come within even the most fragmentary sense of “dishonesty”, and that it is therefore improper to take account of them; but the whole point of *Ghosh* is that a matter is relevant to dishonesty if ordinary people think it is.

No perverse verdict on the issue of honesty is possible. The jury have complete control of the question. The word does not mean what it ordinarily means. It means what a jury decides it means ...²⁹

- 5.19 The same point may be taken further in respect of mens rea. A criminal statute traditionally spells out the mental element required, and the jury are directed (or the magistrates advised) that they must be sure that the defendant acted with the requisite state of mind. In the context of a general dishonesty offence, the fact-finders would have to find *some* blameworthy mental element, but could not be told what it should be. One jury might be satisfied that recklessness as to the truth or otherwise of a representation amounted to dishonesty, whereas in another identical case the jury may require an intention to mislead. Further, some members of the jury or bench may consider recklessness sufficient, while others require intention. If the law is as a general rule right to require the specification of mental elements with some exactitude, then a failure to do so is wrong in principle. A requirement of dishonesty is not an adequate substitute.
- 5.20 Our provisional view is that juries and magistrates should not be asked to set a moral standard on which criminal liability essentially depends. As a general rule, the law should say what is forbidden, and that should be informed by moral

²⁷ Contempt of Court Act 1981, s 8.

²⁸ DW Elliott, “Dishonesty in Theft: A Dispensable Concept” [1982] Crim LR 395, 408–409.

²⁹ DW Elliott, “Law and Fact in Theft Act Cases” [1976] Crim LR 707, 711. If it were apparent in a particular case (eg from a case stated) what factors had been thought by the fact-finders to justify an acquittal on the ground that the defendant’s conduct was not dishonest, it is of course conceivable that a court might qualify *Ghosh* by holding those factors to be irrelevant. But *Ghosh* itself does not appear to envisage this possibility. As the law stands, it would not seem to be open to a judge to direct a jury to ignore a particular factor if the defence invite them to consider it.

insights. A jury or magistrates should then be asked to apply the law by coming to *factual* conclusions, not moral ones.³⁰

The potential ambit of a general dishonesty offence

- 5.21 A general dishonesty offence may extend the reach of the criminal law too far, rendering criminal that which should not be. It is the essence of such an offence that it cannot be said with any certainty what conduct will or will not attract criminal liability. Any restriction of the right of fact-finders to treat particular conduct as dishonest would be inconsistent with the very idea of a general dishonesty offence.

The effect on other dishonesty offences

- 5.22 One effect of a general dishonesty offence, therefore, would be to render largely academic the boundaries of all other offences of dishonesty. Where a person's conduct fell outside a particular offence because of the specific requirements that Parliament has thought appropriate for that offence, the prosecution would be able to circumvent the difficulty by charging the general dishonesty offence instead. For example, the receipt of stolen goods is not an offence under section 22 of the 1968 Act unless the receiver *knows* or *believes* them to be stolen. But some people would say it is dishonest to receive goods which one *suspects* to be stolen. The prosecution could therefore invite the fact-finders to convict a receiver of the general dishonesty offence without being satisfied of the knowledge or belief that the 1968 Act expressly requires.
- 5.23 Similarly, legislation such as the Companies Acts 1985 and 1989, the Insolvency Act 1986 and the Financial Services Act 1986 provide comprehensive regulatory codes in their respective areas, which include numerous specific criminal offences. The distinctions between these offences, and between them and more general, mainstream criminal offences, would be obliterated by a general dishonesty offence. The same could be said of many other offences. If particular offences are too narrow in particular respects then we believe that the right approach is to widen them as far as is necessary, and no further. The effect of a general dishonesty offence would be to widen *every* dishonesty offence, dramatically and indiscriminately; and we provisionally believe that this would be wrong.

The criminalisation of otherwise lawful conduct

- 5.24 The dangers of allowing the ambit of a criminal offence to be determined entirely by *Ghosh* dishonesty are illustrated by the present state of the law of theft, which (as a result of the decision in *Gomez*³¹ that even an authorised dealing with property is an "appropriation" of it) effectively now consists of doing something "dishonest" with another's property with the intention of permanently depriving the other of it. Recent decisions make it clear that theft may be committed where the defendant's conduct does not even give rise to a remedy in civil law. In *Hopkins*

³⁰ We do not question the right of juries to come to a perverse verdict of not guilty (perhaps on the basis of the perceived moral repugnance of the law or the particular prosecution), which raises different issues.

³¹ [1993] AC 442.

and *Kendrick*³² and *Hinks*,³³ the defendants claimed that they had legitimately received money from a vulnerable donor, either for consideration or as gifts, and had therefore acquired indefeasible title to the money transferred. In both cases it was held that the availability or otherwise of a civil remedy was simply not relevant to their liability for theft.³⁴ That they had appropriated the money with the intention of permanently depriving the donee of it was not effectively in issue. The *only* issue for the jury was therefore whether or not they were dishonest in doing so.

5.25 The defendants in *Hopkins and Kendrick*³⁵ ran a residential care home for old people. The victim, a vulnerable, frail and confused woman, was in their care and entrusted them with her affairs. They were convicted of conspiracy to steal, having conducted her affairs in such a way as to benefit themselves very substantially. The transfers from the victim to them were not for the most part gifts, but were made (if they had any pretension to validity at all) on the basis of consideration given by the defendants under the contract for the victim's care. The Court of Appeal upheld the convictions although the judge had given no direction as to whether or not the defendants had obtained indefeasible title to the money transferred.

5.26 In *Hinks*,³⁶ the defendant, a single mother, befriended a 53-year-old man described as naive, gullible and of limited intelligence. The Crown's case was that over a period of some months she "influenced, coerced or encouraged" the loser to withdraw a total of about £60,000 from a building society account and to transfer it to her. Her defence was that the money was given to her or her son as gifts or loans. The court held that the judge was right to tell the jury that if they found that the payments were gifts, they should consider whether the defendant was dishonest in accepting them.

5.27 Before these decisions,³⁷ Professor Sir John Smith had suggested a number of examples of conduct which, though arguably dishonest, could not be theft. It now seems that they could indeed be theft. One example is where P sees D's painting of Salisbury Cathedral, and, thinking he is getting a bargain, offers D £100,000. D realises that P thinks the painting is by Constable, but knows that it is really by his sister and is worth at most £100. P accepts D's offer. Although D has made an

³² [1997] 2 Cr App R 524.

³³ [1998] Crim LR 904. The Court of Appeal, Criminal Division certified a question relating to a point of law of general public importance for the purposes of an appeal to the House of Lords, but refused leave to appeal. It is not clear from the transcript how the judge at first instance directed the jury on claim of right. It would seem at least possible that the jury should have been asked to consider whether the gifts were valid because, if they were, it would at least make it more likely to be true that H believed she had a claim of right, and thus was not to be considered dishonest under s 2(1)(a) of the Theft Act 1968.

³⁴ In each case the court effectively indicated (implicitly in *Hopkins and Kendrick*, explicitly in *Hinks*) that it had been wrong to find the contrary in *Mazo* [1997] 2 Cr App R 518. The concessions made by Crown counsel in *Mazo* that there could be no theft where there was a valid gift, and that the jury should have been so directed, were said in the later cases to have been wrongly made.

³⁵ [1997] 2 Cr App R 524.

³⁶ [1998] Crim LR 904.

³⁷ In his commentary on *Mazo* [1996] Crim LR 436.

enforceable contract and is entitled to recover and retain the money, he can still be convicted of theft if the fact-finders think his conduct dishonest. Similarly, if a knowledgeable buyer bought a genuine Constable for a small sum from a seller ignorant of the artist's identity, the seller would not be able to recover the painting or its true value in civil proceedings; yet the buyer could apparently be convicted of stealing it.

- 5.28 In our provisional view, this is an unsatisfactory state of affairs. In general, we believe that the criminal law should take a robust view of what is to be allowed in the market place; and in particular we think it wrong that conduct which is not actionable (that is, which gives rise to no remedy in civil law)³⁸ should be regarded as a substantive³⁹ crime of dishonesty.⁴⁰ The proper role of the criminal law of dishonesty, in our view, is to provide additional protection for rights and interests which are already protected by the civil law of property and obligations. To apply it to conduct which gives rise to no civil liability is to extend it beyond its proper function. We therefore do not believe that it should be criminal to accept a gift, or a transfer of property for consideration, *merely* because some people would regard it as a dishonest thing to do.

EXCLUDING CONDUCT WHICH IS NOT ACTIONABLE

- 5.29 It may be argued that this is not necessarily an objection to the introduction of a general dishonesty offence, because such an offence might be formulated in such a way as expressly to exclude conduct which is not actionable in civil law. Our provisional view is that this is not a complete answer, for two reasons. In the first place, it would require a judge in a criminal court to make a ruling on a submission of no case to answer, and then direct the jury, on what could be very difficult civil law concepts. We consider that it is impractical, time consuming and costly, and therefore undesirable, to expect criminal advocates to argue such matters, and judges in criminal courts to rule on them. The civil law itself may well be unclear or undetermined.⁴¹ How would a judge in the Crown Court be

³⁸ "Actionable" conduct therefore includes equitable wrongs, and conduct which is not wrongful but gives rise to a remedy (eg in restitution).

³⁹ Some inchoate offences may not be actionable, depending on the scope of the relevant part of the civil law. This does not seem to us to undermine the principle, so long as the *full* offence is actionable. The extension of the criminal law involved in inchoate offences has its own justification, and is logically derived from the relevant substantive crime.

⁴⁰ The discussion is limited to offences against property, where the criminal will always infringe a specific personal right of the victim. In other categories of offences, such as offences against public order or the state, no question is raised by the lack of a civil remedy for those who suffer as a result of a crime.

⁴¹ Criminal litigation may throw up points of law which the civil courts have not yet had to decide, because they are not the sort of point that is likely to arise in civil litigation. One example is the possible civil liability of a person who without authority causes a sum to be charged to another person's credit card account. We are not aware of any clear authority for a civil remedy in such circumstances. But it would be unsatisfactory if the point had to be determined in the context of a criminal trial for credit card fraud.

expected to deal with equitable doctrines, or the possible application of discretionary remedies?⁴²

- 5.30 Secondly, the possibility of criminal liability for conduct which is not actionable in civil law is only the most extreme example of how unacceptably wide a general dishonesty offence might be. Eliminating that extreme example of the problem does not solve the underlying problem. Even if it were provided that the general dishonesty offence does not catch conduct which is not actionable, it would still catch all conduct which causes loss to another, is actionable by that other, and is characterised by the fact-finders as dishonest. For example, there might be circumstances in which some people would think it dishonest to default on a debt or other contractual obligation. In such circumstances, such a default would be criminal.
- 5.31 Our provisional view is that this option too would be unacceptable. Leaving aside those offences that already use dishonesty as a positive element (such as theft and conspiracy to defraud), there are many kinds of conduct which, though they may give rise to civil liability, the criminal law regards as lying outside its province; and we think that on the whole it is right to do so. There is no pressing need to criminalise breaches of contract and the non-payment of debts, even if they are characterised as “dishonest”. And in the absence of such a need, we do not believe that it would be right to create an offence which is *capable* of criminalising such conduct.

Conclusion

- 5.32 We find the criticisms of *Ghosh* dishonesty compelling, and they have significantly greater force in relation to dishonesty as a positive element. **We provisionally conclude that it is undesirable in principle that conduct which is otherwise unobjectionable should be rendered criminal merely because fact-finders are willing to characterise it as “dishonest”.** If this is right then it follows that a general dishonesty offence would not be acceptable.

CERTAINTY AND THE ECHR

- 5.33 If our analysis of dishonesty above is right, it poses the question of whether dishonesty is so uncertain a concept that a general dishonesty offence would in any event be precluded by the ECHR. It is to that question that we turn in this section. First we consider the relevant jurisprudence of the Strasbourg Court. We then go on to consider the implications of that jurisprudence now that the ECHR has been incorporated into domestic law by the Human Rights Act 1998. That requires

⁴² A possible counter-argument is that the criminal law of dishonesty operates against the background of the civil law of property. For example, it is essential to the offence of theft that the property stolen should, in law, be property “belonging to another”. It follows that there is always the possibility of a judge in a criminal trial having to rule on the application of civil law concepts. But we think it is desirable to minimise the circumstances in which such rulings are required. If the dishonesty offences are defined in such a way that the conduct caught by them will almost inevitably be actionable (such as the obtaining of benefits by deception, or unauthorised dealings with the property of others) then the possibility of conflict with the civil law is unlikely to arise. In the context of a general dishonesty offence, on the other hand, this possibility would be ever-present.

consideration of two particular points – the relevance, or lack of it, of the Strasbourg notion of a margin of appreciation allowed to states in securing Convention rights; and the position that would face a Home Secretary considering whether to make a statement of compatibility under section 19 of the Human Rights Act.

The jurisprudence of the Strasbourg Court

- 5.34 An underlying principle of certainty in the law has been developed by the institutions of the Court. Certainty in the criminal law amounts to a Convention right per se, as a result of the jurisprudence by which Article 7 has been developed. Article 7(1) states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.⁴³

- 5.35 While at first glance it might appear that Article 7 is only concerned with the imposition of criminal offences and penalties with retrospective effect, it is now clear that the principle which it enshrines is the broader principle of legal certainty. Thus the Commission has stated:

Article 7 para 1 of the Convention confirms the general principle that legal provisions which interfere with individual rights must be adequately accessible, and formulated with sufficient precision to enable the citizen to regulate his conduct.⁴⁴

- 5.36 The meaning of Article 7 was discussed by the Commission in *Handyside v UK*.⁴⁵ The applicant was charged with an offence under the Obscene Publications Acts 1959 and 1964. The applicant alleged a breach of (among others) Article 7, arguing that the definition of “obscenity” in the Acts (namely that, if taken as a whole, the matter tends to deprave and corrupt persons who are likely to read, see or hear it)⁴⁶ was “so far reaching and imprecise that it might be applied almost without limit.” The Commission stated:

It is ... true that, under the established jurisprudence of the Commission, [Article 7(1)] does not merely prohibit – except as provided in paragraph (2) – retroactive application of the criminal law to the detriment of the accused but confirms, in a more general way, the principle of the statutory nature of offences and punishment (*nullum crimen, nulla poena sine lege*). It prohibits, in particular, extension of the application of the criminal law “in malam partem” by analogy. In the Commission’s opinion, this principle includes the requirement that the offences should be clearly described by law.

⁴³ Paragraph (2) preserves retrospective effect in respect of the trial and punishment of crimes against humanity and war crimes.

⁴⁴ *G v Federal Republic of Germany* 60 DR 252, 262 (1989).

⁴⁵ A 24 (1976).

⁴⁶ Section 1(1) of the 1959 Act.

However, the Commission points out that the requirement of certainty in the law cannot mean that the concrete facts giving rise to criminal liability should be set out in the statute concerned. This requirement is satisfied where it is possible to determine from the relevant statutory provision what act or omission is subject to criminal liability, even if such determination derives from the courts' interpretation of the provision concerned.⁴⁷

5.37 Applying these principles the Commission held that the wording of the Obscene Publication Act 1959 was

sufficiently clear to describe the act which [was] subject to a penal sanction and to allow the courts, by interpreting those terms, to determine the criminal liability involved.⁴⁸

5.38 Thus the Commission was of the opinion that, while Article 7 required there to be certainty in the law, this requirement is satisfied by a general definition of an offence if the courts can interpret it so as to determine what acts or omission are subject to criminal liability. Dishonesty, however, is a question for the fact-finders alone, and thus incapable of development or clarification by the judges.

5.39 In the event, the Court in *Handyside v UK* concluded that Article 7 was not relevant to the case; but the Court has subsequently adopted the same interpretation. Thus in *SW v UK*,⁴⁹ the purpose of Article 7 was explained thus:

The guarantee enshrined in Article 7 ... is an essential element of the rule of law It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.⁵⁰

Accordingly, as the Court held in its *Kokkinakis v Greece*⁵¹ judgment ... Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally

⁴⁷ Para 2.

⁴⁸ *Ibid.*

⁴⁹ A 335-B (1995). The case of *CR v UK* A 335-C (1995) was decided on the same day and the principles stated are the same as those in *SW v UK*. The cases concerned the House of Lords decision in *R v R* [1992] 1 AC 599 that sexual intercourse without consent within marriage was rape, a question about retrospectivity proper, but the Court nevertheless considered the nature of Article 7 generally.

⁵⁰ A 335-B, para 34 (1995).

⁵¹ A 260-A, para 52 (1993) [footnote supplied].

liable. The Court thus indicated that when speaking of “law” Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability ...⁵²

- 5.40 The principle of certainty in the criminal law is thus enshrined in Article 7. However, the same doctrine applies elsewhere where the Convention has recourse to terms such as “lawful detention” or “a procedure prescribed by law” as part of the description of legitimate interferences with rights.⁵³
- 5.41 Of particular importance is Article 5, which protects the right to liberty and security.⁵⁴ The article provides that no-one may be deprived of liberty except according to a “procedure prescribed by law”, and for certain specified purposes, including “lawful detention” after conviction for a criminal offence, under “lawful arrest” and so forth. These terms relate directly to the principle of certainty discussed above in connection with Article 7. An application contesting the certainty of a general dishonesty offence could therefore be made under either Article 7 or Article 5, or both, depending on the facts of the case. In the first place, the “law” concerned is of course the domestic law of the state, with which the act complained of must be in conformity to avoid a violation. But the requirement goes further: “the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein”.⁵⁵
- 5.42 Part of what those “general principles” were was spelt out in the *Sunday Times* case:

In the Court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”.⁵⁶ First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁵⁷

- 5.43 The thrust of our analysis of dishonesty as a positive element is that, in certain circumstances, a person may not be able to foresee with any reasonable degree of

⁵² A 335-B, para 35 (1995). At para 37, the Court cited as recent authority for this the *Tolstoy Miloslavsky v UK* judgment, A 316-B (1995).

⁵³ *SW v UK*, A 335-B, para 35 (1995): “when speaking of ‘law’ Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability”.

⁵⁴ For the text, see Appendix C. The case law relating to Article 7 is sparse – there is a great deal more on Article 5.

⁵⁵ *Winterwerp v The Netherlands* A 33, para 45 (1979).

⁵⁶ In Article 5 [footnote supplied].

⁵⁷ A 30, para 49 (1979).

accuracy whether a proposed course of action would or would not be criminal. Seeking legal advice is not likely to take matters any further, since a lawyer's guess as to what a jury may think "dishonest" is likely to be no better than anyone else's.

- 5.44 However, the threshold level of uncertainty required for a violation of the requirements of the Convention appears to be high. In *Steel and others v UK*,⁵⁸ the Court found in the context of Article 5 that binding over to keep the peace was sufficiently certain, and thus detention under the associated power of arrest, and as a result of a refusal to be bound over, were not violations.⁵⁹ In our report on binding over,⁶⁰ we recommended the abolition of the jurisdiction, at least in part because we considered it insufficiently certain – a conclusion in which we were fortified by consideration of the Convention. In *Wingrove v UK*,⁶¹ the Court similarly upheld the English common law offence of blasphemy, an Article 10 (freedom of expression) case relating to the withholding of a certificate for a video film. The definition of the offence was taken from *Whitehouse v Gay News Ltd and Lemon*:⁶² a publication is blasphemous if in its manner of advocacy of a position, it contains "contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England". In *Kokkinakis v Greece*,⁶³ a case brought alleging a violation of (among others) Article 7, a Greek law forbidding "proselytism" was upheld.⁶⁴
- 5.45 In each of these cases, however, the Court relied on certain features to find that the relevant law was sufficiently certain. In *Steel v UK*, it was said that the recent jurisprudence of the English courts had sufficiently clarified the concept of breach of the peace by stating that it occurred only where a person caused harm or appeared likely to do, or acted in a manner likely to provoke others to violence.⁶⁵ On the distinct question of whether a order binding over applicants to be of good behaviour was imprecise, the Court felt that this was the case, but that it did not amount to a violation because sufficient clarity was provided by the context within which the order was made.⁶⁶ In *Wingrove v UK*, the words "contemptuous,

⁵⁸ 23 September 1998, transcript available on the Court's website (at <http://www.dhcour.coe.fr>).

⁵⁹ Para 55. Breach of the peace was established to be criminal in nature, in accordance with the autonomous meaning given to that concept in the Convention. Of the five cases considered, the Court found a violation in respect of three, but that was essentially because their arrest was not lawful in the sense of in compliance with domestic law.

⁶⁰ Binding Over (1994) Law Com No 222. The Court in *Steel v UK* quoted para 6.27. The Convention is dealt with in Part V.

⁶¹ (1997) 24 EHRR 1.

⁶² [1979] AC 617, 665.

⁶³ A 260-A, para 52 (1993).

⁶⁴ Para 40. The Greek law forbids proselytism, and provides "By 'proselytism' is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety." See para 16 of the judgment.

⁶⁵ Para 54.

⁶⁶ Para 76.

reviling, scurrilous or ludicrous” were sufficient to indicate the high degree of injury to religious feeling required for the offence to be made out.⁶⁷ In *Kokkinakis v Greece*, the Court relied on a “settled national case-law” which interpreted what would otherwise be a vague law.⁶⁸

- 5.46 From this consideration of the Convention, we draw the conclusion that, should a general dishonesty offence be enacted, it would at least be open to challenge in Strasbourg. However, there are two further considerations, both consequences of the incorporation of the Convention into English law by the Human Rights Act 1998, which mean that the Convention may be more of an obstacle to the adoption of a general dishonesty offence than was the case before the Act.

The margin of appreciation

- 5.47 A crucial feature of the Convention jurisdiction is that it allows national institutions a “margin of appreciation”. This term denotes the area of discretion which is granted by the Court to national authorities in the implementation of the Convention. The Court recognises that the national institutions are closer to the “vital forces of their countries”⁶⁹ than those in Strasbourg, and thus should be given a discretion, subject to review in Strasbourg, particularly in judging when an infringement of a right is justified by some criterion in the Convention.⁷⁰ The margin of appreciation is variable,⁷¹ and it will generally be broader in respect of the qualified rights (Articles 8–11), although it also applies to Article 5.⁷² Once English courts start to apply the Convention directly in accordance with the Human Rights Act, the question arises as to how the margin of appreciation will be dealt with.⁷³
- 5.48 It would be theoretically possible for the English courts to take the view that the Act merely requires them to consider whether a possible violation is within what the Strasbourg Court would regard as the margin of appreciation. However, it seems much more likely that the courts will conclude that the doctrine is a product of the international perspective of the Strasbourg Court, and thus does not have effect when Convention rights are directly implemented by English courts. If that is so, in logic we would expect, other things being equal, to see a distinctly stronger line being taken in the national courts on the protection of Convention rights than would necessarily be evident in Strasbourg. It may be that

⁶⁷ Para 60.

⁶⁸ Para 40.

⁶⁹ *Handyside v UK* A 24, para 48 (1976).

⁷⁰ For the margin of appreciation generally, see Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995) pp 12–15.

⁷¹ *Gillow v UK* A 109 para 55 (1986): “the scope of the margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the right involved . . . The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government”.

⁷² See, eg, *Winterwerp v Netherlands* A 33 (1979); *Weeks v UK* A 114 (1987); *Brogan v UK* A 145-B (1988).

⁷³ General implementation of the Act is expected, at present, to be during 2000.

the national courts will develop a parallel doctrine of a margin of discretion to be afforded by the courts to the executive or other decision makers, possessed as they may be of a better position to make policy judgments. But such a margin would presumably be generally narrower than the Strasbourg margin of appreciation, and would be particularly narrow in areas in which the courts have their own expertise, such as criminal law, and which touch on the liberty of the subject.⁷⁴ So the position seems to us. But we add a note of caution: we accept the possibility that the courts may, in law or in practice, apply the traditional *Wednesbury*⁷⁵ reasonableness test. If that were so, as a generality we could say no more than that any substitute margin of discretion would be at least no broader than the Strasbourg margin of appreciation.

The statement of compatibility

- 5.49 Section 19 of the Human Rights Act 1998, which is already in force, requires a Government minister in charge of a Bill in Parliament to make a statement before second reading that, in his or her view, the provisions of the Bill are compatible with the Convention rights. The Government can proceed with the Bill in the absence of such a statement, but if it wishes to do so it, that too must be stated. Arrangements have been made for the statement to appear on the face of the published Bill.
- 5.50 The question of the compatibility or otherwise of a general dishonesty offence therefore presents itself first in the question of whether the Home Secretary could make a statement of compatibility. It is inconceivable to us that a Home Secretary would be prepared to undertake such a profound reform to the criminal law as the introduction of a general dishonesty offence without making a statement of compatibility.
- 5.51 At the least, it seems to us that it is not at all clear that a general dishonesty offence would not violate the requirements of legality and certainty underpinning the Convention. In such circumstances, it appears that the Home Secretary could not make a statement of compatibility.⁷⁶ Clearly, this is as it should be. In the new human rights era, criminal legislation should not be contemplated unless it is *clearly* in accordance with the Convention.

⁷⁴ For discussion of this issue see, eg, Lord Irvine of Lairg LC “The Development of Human Rights in Britain under an Incorporated Convention on Human Rights” [1998] PL 221; The Honourable Sir John Laws, “The Limitations of Human Rights” [1998] PL 225; David Pannick QC, “The Human Rights Bill and the Margin of Appreciation” August 1998 Government Legal Service Journal 1; John Finnis, “A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence” (1985) LXXI Proceedings of the British Academy 303; Timothy Jones, “The Devaluation of Human Rights under the European Convention” [1995] PL 430, 447.

⁷⁵ *Associated Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

⁷⁶ White Paper “Bringing Rights Home – the Human Rights Bill” (1997) para 3.3: where “arguments in relation to the Convention issues raised are not clear-cut” a statement of compatibility will not be made.

Conclusion

- 5.52 **We provisionally conclude that a Home Secretary could not safely be advised to make a statement of compatibility in relation to a Bill creating a general dishonesty offence.** It would at least be seriously doubtful whether such an offence would comply with the requirements for lawful restrictions on Convention rights.
- 5.53 In the light of this conclusion, coupled with our view that such an offence would in any event be objectionable in principle, **we provisionally reject the option of creating a general dishonesty offence.**

PART VI

THE CASE AGAINST A GENERAL DECEPTION OFFENCE

- 6.1 In this Part we assess the strength of the case for a general fraud offence based on deception, rather than dishonesty alone. We consider first the arguments advanced against the general deception offence proposed by the CLRC in 1966. We then consider how far such an offence would take the law beyond the specific and arguably desirable extensions identified in Part IV above, assess whether such a further enlargement of the law would be desirable, and provisionally conclude that it would not.

THE CLRC'S PROPOSED OFFENCE

- 6.2 Clause 12(3) of the CLRC's draft Theft Bill read as follows:

A person who dishonestly, with a view to gain for himself or another, by any deception induces a person to do or refrain from doing any act shall on conviction on indictment be liable to imprisonment for a term not exceeding two years.¹

- 6.3 Clause 12 was the subject of "substantial difference of opinion in the committee", and subsection (3) was described as "a compromise between two radically different proposals".² One such proposal would have involved the creation of a general deception offence along the lines of clause 12(3), but with a much higher maximum sentence. This would have made it unnecessary to include the more specific deception offences recommended by the CLRC, of obtaining property³ (clause 12(1), which became section 15 of the 1968 Act) and credit (clause 12(2), which was not enacted) and of procuring the execution of a valuable security (clause 16(2), which became section 20(2)).
- 6.4 At the opposite extreme it was argued that the specific offences went far enough and that (irrespective of the maximum sentence) a general offence of the kind set out in clause 12(3) should not be created at all. The relevant paragraphs of the CLRC report are reproduced in Appendix A below. They essentially come down to five specific criticisms.

- (1) The offence was too general and imprecise.

¹ Clause 12 became cl 15 when the Bill was presented before Parliament; but to avoid confusion we refer to this and other clauses by their numbering in the draft Bill, and references in the Parliamentary debates are edited accordingly.

² CLRC Eighth Report, para 97.

³ The maximum sentence proposed by this party for the general deception offence was seven years' imprisonment, which, being less than the ten years recommended for the obtaining of property by deception, would not have rendered the latter offence dispensable; but this difficulty could obviously have been surmounted by making the *general* offence subject to a maximum of ten years.

- (2) It would be essentially preparatory. Attempting to commit it would therefore extend liability too far backwards.
- (3) It would cover minor cases of deception which should not be criminal.
- (4) It would overlap with other offences, and overlap completely (penalty apart) with the two other offences in clause 12.
- (5) It was illogical that there was no equivalent to the requirement of intention permanently to deprive in theft and obtaining property by deception.

We consider these objections in turn.

Uncertainty

- 6.5 In *Preddy* Lord Goff described the argument that a general deception offence would be insufficiently precise as “the so-called principle of legality, which has a respectable theoretical foundation but can perhaps be a little unrealistic in practice”. He went on to note that “[t]he same criticism can, of course, be levelled at Scots law which appears, however, to suffer from no adverse consequences in practice, no doubt because of the good sense of the prosecuting authorities”.⁴
- 6.6 In Scotland, private prosecutions are almost unknown, and accordingly the danger of such prosecutions does not undercut reliance on the “good sense” of prosecutors. Even in England, private prosecutions are subject to procedural restraints by the state, even where (as in the deception offences) there is no requirement for the consent of the Attorney-General or the DPP. In particular, a magistrate may refuse to issue a summons; the Attorney-General may terminate proceedings by entering a nolle prosequi; the DPP may take over a private prosecution and terminate it by discontinuance, withdrawal or by offering no evidence; and the Attorney-General can prevent proceedings being instituted by vexatious litigants.⁵
- 6.7 If a general deception offence (or indeed a general dishonesty offence) were introduced, it would be possible to strengthen these safeguards by providing that a prosecution cannot be brought at all without the consent of the DPP or the Law Officers. We recently considered the desirability of such provisions,⁶ and concluded that they are appropriate only in three categories of offence:
 - (1) where it is very likely that a defendant will reasonably contend that prosecution for a particular offence would violate his or her Convention rights;⁷
 - (2) those which involve the national security or have some international element;⁸ and

⁴ [1996] AC 815, 831.

⁵ See our report *Consents to Prosecution* (1998) Law Com No 255, paras 2.14, 2.16 – 2.20.

⁶ *Ibid.*

⁷ *Ibid.*, paras 6.21 – 6.37 (recommendation 11).

- (3) offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm.⁹

6.8 Our provisional view is that a general deception offence would not fall within any of those categories. It is significant that at present, private prosecutions can be brought for a number of general dishonesty offences, such as theft and conspiracy to defraud, and there is no evidence that this power is being abused. The argument for making a general deception offence subject to a consent requirement would be based on the argument that such an offence is potentially very wide and imprecise. Indeed, in a memorandum submitted by the Home Office to the Franks Committee,¹⁰ it was suggested that one reason for including a consent requirement was

to secure consistency of practice in bringing prosecutions, for example, where it is not possible to define the offence very precisely so that the law goes wider than the mischief aimed at or is open to a variety of interpretations.¹¹

6.9 But in our report we disagreed with this view:¹² we did not want the availability of consent provisions to be treated as an alternative to the precise formulation of offences, and we would be reluctant to suggest the enactment of an imprecise crime in reliance on the good sense of prosecutors. We note that precisely that close control of the prosecution process by the authorities relied on by Lord Goff has been criticised as itself a source of imprecision in Scottish criminal law.¹³

6.10 The view of the majority of the CLRC, in defence of the generality of draft clause 12(3), was summarised as follows:

They do not think that the notion of dishonestly using deception with a view to gain is too general or uncertain to be made the basis of a criminal offence. The notion of dishonesty seems clear enough without a definition ...; and the definition of “deception” ... and that of gain ... seem sufficient for the purpose of clause 12(3) ...

⁸ *Ibid*, paras 6.40 – 6.46 (recommendation 12). Offences would be regarded as involving some “international element” if they:

- 1) are related to the international obligations of the State;
- 2) involve measures that were introduced to combat international terrorism;
- 3) involve measures introducing response to international conflict; or
- 4) have a bearing on international relations.

⁹ *Ibid*, paras 6.47 – 6.52 (recommendation 13).

¹⁰ The Departmental Committee on section 2 of the Official Secrets Act 1911, chaired by Lord Franks. The Committee’s report was published in 1972 as Cmnd 5104.

¹¹ Franks Report, vol 2, p 125, para 7(a).

¹² Law Com No 255, paras 6.3 – 6.7.

¹³ Gerald H Gordon, *The Criminal Law of Scotland* (2nd ed 1978) para 0-04.

- 6.11 History has shown that the Committee was optimistic in thinking that dishonesty needed no definition, and it is arguable that the approach which has since been adopted by the courts introduces an unacceptable degree of uncertainty. That apart, we provisionally agree with the majority of the CLRC that a general deception offence would not necessarily be excessively vague. Deception, as an element in offences, is fundamentally different from dishonesty. It describes a particular kind of conduct which is *prima facie* wrong, whereas dishonesty is no more than a moral judgment. We do not believe that an offence drafted in terms resembling clause 12(3) would be too vague in the sense that the individual would not be able to regulate his or her affairs and know that he or she would not be committing the offence. The offence would be very wide, and we consider that criticism below;¹⁴ but width is not the same as vagueness.
- 6.12 Similarly, by contrast with a general dishonesty offence, we believe that the creation of a general deception offence would probably not infringe rights conferred by the ECHR. Our provisional view is that there is no reason why a Home Secretary could not make a statement of compatibility in relation to a Bill creating a general deception offence.

Inconsistency with the principles of inchoate liability

- 6.13 In relation to the objection that clause 12(3) would amount to an unacceptable extension of inchoate liability, the view of the majority of the CLRC was summarised as follows:

It seems to the committee generally that the deception or attempted deception is sufficiently proximate to the gain to justify making it criminal. A person who dishonestly uses or attempts to use deception in the way and for the purpose mentioned will have advanced a considerable way in wrongdoing.

- 6.14 This paragraph arguably does not meet the objection. It cannot be said that the deception will necessarily be sufficiently proximate to the gain unless that follows inevitably from proof of the facts that clause 12(3) requires to be proved; and this does not appear to be the case. D might deceive V into doing an act which sets off a long chain of events, intended to result eventually in gain to D. It must be doubtful whether the deception would then be sufficiently proximate to the gain to justify making it criminal.
- 6.15 But it is not obvious that the deception should have to be proximate to the *gain* in any event. Arguably it should be enough that the deception is sufficiently proximate to the effect that it has on the person deceived, namely the act or omission in question; and this clearly *is* the case. If the ordinary principles of inchoate liability say that a person acting in the manner prohibited by clause 12(3) commits only a preparatory act, in our view this suggests that the ordinary principles of inchoate liability are too narrow. We provisionally reject this objection.

¹⁴ Paras 6.25 – 6.30.

Criminalising minor deceptions

- 6.16 This was the main ground on which the CLRC's clause 12(3) was attacked in the debate in the House of Lords. The CLRC defended their proposal against the criticism in the following terms:

Any general offence of dishonesty is bound to include cases which will be too trivial to deserve punishment. This is equally true of obtaining by false pretences under the existing law (or the corresponding offence under clause 12(1) of the Bill) and indeed of theft. Despite the many summary offences aimed at the making of dishonest gains, the general view of the committee is that the existing law, even with the extensions proposed elsewhere in the Bill, does leave a gap by which serious cases of fraud may escape adequate punishment, and that this gap ought to be filled. Using an out-of-date season ticket and avoiding paying tolls may be trivial examples of obtaining services by deception and deserve only a minor penalty on summary conviction, but there can be much graver frauds of a similar character. The existing summary offences, which have been created for a variety of purposes and sometimes go further than clause 12(3) (for example, in covering statements made recklessly but not otherwise dishonestly), do not do away with the need for a more serious offence of swindling in whatever shape or context.¹⁵

- 6.17 Both of the examples chosen are (trivial) examples of obtaining services by deception. Influential voices who criticised the proposal in the House of Lords accepted that there might be an argument for including the obtaining of services, but that, if that were the target, it should be explicitly included in clause 12(1) rather than incidentally caught by a much wider offence.¹⁶ That the argument proceeded in this way means it is of less relevance to us now, since obtaining services by deception is now an offence under section 1 of the Theft Act 1978. To the extent that it criticises the criminalisation of *trivial* deceptions, in our view it lacks force. As we explain elsewhere,¹⁷ any property offence drafted in reasonably broad terms is likely to criminalise trivial instances of the conduct at which it is aimed; in our view that is not a serious objection in principle.
- 6.18 However, we believe that this objection should be distinguished from the argument that a general deception offence would be too *wide*. This latter argument is not concerned only with the criminalisation of trivial or minor deceptions. On the contrary, it seems to us to be the principal objection to such an offence, and we deal with it below.¹⁸

Overlap with other deception offences

- 6.19 The majority of the CLRC did not think it a disadvantage of clause 12(3) that it overlapped with other offences under the draft Bill, or even that it made them redundant.

¹⁵ CLRC Eighth Report, para 100(iii).

¹⁶ See Viscount Dilhorne, *Hansard* (HL) 12 March 1968, vol 290, col 163, and Lord Wilberforce, *ibid*, col 165.

¹⁷ Para 7.42 below.

¹⁸ Paras 6.25 – 6.30.

It seems to them convenient that there should be a residual offence which can be charged when it may be impossible to prove the existence of factors necessary to constitute more serious offences of deception.¹⁹

- 6.20 We would not necessarily agree that it is acceptable for one offence to be wholly subsumed in another. Were we to recommend a general deception offence, we would probably recommend the repeal of the specific offences that now cover some of the same ground, unless there was a particular, demonstrated need for a separate offence. But in our view this is a secondary issue, to be addressed if and when it is determined that a general offence would be desirable: it is not relevant to the question of whether such an offence *is* desirable.

Inconsistency with other deception offences

- 6.21 At Committee Stage in the House of Lords, Viscount Dilhorne, proposing the amendment that resulted in the omission of subsection (3),²⁰ argued that clause 12 was “a very curious one” because of its internal inconsistencies. He laid particular emphasis on the fact that, while an appropriation of property would not be theft in the absence of an intention permanently to deprive, it would be an offence under clause 12(3) to obtain a loan of property by deception.

- 6.22 In answer to the similar objection raised by a minority of its members, the CLRC conceded that

it may seem curious that deception in order to obtain the loan of a thing should be an offence under clause 12(3) when temporary appropriation generally is not an offence. But it is not necessarily an objection to a Bill that it omits to provide for some kinds of conduct comparable with others for which it does provide. Moreover there are ... objections to making temporary appropriation criminal; and the offence under clause 12(3) does at least require that the loan should have been obtained or sought by deception and with a view to gain.

- 6.23 Our provisional view²¹ is that the obtaining of property by deception ought to be criminal even where there is no intention permanently to deprive (and even where there is no understanding that the use of the property is to be paid for, in which case there would be an offence under section 1 of the 1978 Act). If this proposal were implemented, this particular inconsistency would not arise.

- 6.24 Moreover, as we have said,²² the question is whether a general deception offence would be desirable in itself. If the decision were taken to enact such an offence, further decisions would need to be taken about whether the existing deception offences should be abolished, retained as they stand, or amended in such a way as to minimise inconsistencies between them and the general deception offence. We do not think that the possibility of their being retained in such a form as to create

¹⁹ CLRC Eighth Report, para 100(iv).

²⁰ This amendment was passed by a majority of 42 to 37.

²¹ See paras 7.29 – 7.30 below.

²² Paras 6.19 – 6.20 above.

inconsistencies can be regarded as an argument against the general deception offence.

THE BREADTH OF A GENERAL DECEPTION OFFENCE

- 6.25 In considering how far the law would be extended by a general deception offence, we prefer to think of such an offence as being framed in terms of loss rather than gain or a view to gain. We consider that, contrary to the implication of the drafting of clause 12(3), the paradigm of fraud is the *infliction of financial loss* by deception, not deception with a view to gain. Were we to recommend a general deception offence, it would be on the basis of the criminalisation of the infliction of such loss. It is true that fraudsters are generally motivated by greed, not malice. It is gain that predominates in their minds: the concomitant loss is incidental. But the function of the criminal law of dishonesty is to protect economic interests from improper violation, not to penalise over-acquisitiveness in itself. It is the effects of fraud on its victims, not the motivations of its practitioners, that justify the intervention of the criminal law. We therefore believe that it would be preferable for the definition of a general deception offence to focus on loss rather than gain.
- 6.26 Financial loss can take various forms – for example:
- (1) loss of possession or control of, or damage to, tangible property;
 - (2) loss of a legal right, such as a chose in action or other intangible property;²³
 - (3) loss of the chance of a fee for the performance of a service;
 - (4) the non-fulfilment of a legal obligation owed to V by D or a third party, although the obligation continues to exist, and V knows it does (for example, the non-payment of a debt).
- 6.27 These forms of loss are broadly those covered by the existing specific offences of obtaining property by deception, obtaining a service by deception and evasion of liability by deception. However, a general deception offence would go further. Other forms of loss include the following examples:
- (1) D, V's business rival, starts a false rumour that A, V's best customer, is on the brink of insolvency. V hears the rumour, believes it, and withdraws A's credit. A takes his business elsewhere, and V's profits suffer.
 - (2) D starts a false rumour that B, V's chief supplier, is having production difficulties which will affect B's ability to meet orders. V hears the rumour, believes it, and places most of her orders with another and more expensive supplier. V's profits suffer.
 - (3) V is trying to sell her house. Her estate agent introduces a prospective buyer, C, whose requirements the house suits perfectly, and arranges for C to view it. Pretending to be an employee of the estate agent, D telephones

²³ Other examples of this category might include the loss of the right (strictly, a liberty or "privilege") to act or refrain from acting in a particular way; or the loss of an "immunity", ie becoming subject to a legal power.

V and tells her that C has cancelled his appointment. V therefore goes out for the day. C arrives as arranged, but gets no answer, and buys another house instead. V eventually sells her house for substantially less than C was willing to pay.

- (4) D, a manufacturer, falsely claims that his products are superior to those of his rivals, who lose sales as a result.²⁴

6.28 We note that in jurisdictions which have general fraud offences it seems to be sufficient that there is damage to the victim's overall financial position. Some jurisdictions do not require financial loss at all, let alone financial loss of a particular kind.²⁵ Even in Canada, where section 380 of the Criminal Code requires that the victim be defrauded of "any property, money or valuable security", it has been held sufficient that the defendant impairs the victim's prospects of making a profit.²⁶

6.29 Obviously we would not deny that conduct of the kinds described at paragraph 6.27 above is morally reprehensible. Arguably it is so reprehensible that the person responsible would have no legitimate complaint if he or she were convicted of a criminal offence.²⁷ (Indeed, if he or she did the same thing in concert with another person, they would presumably be guilty of a conspiracy to defraud under the existing law.) But in our view this is the wrong approach. Rather than ask whether there is any reason why such conduct should *not* be criminal, we prefer to ask whether there is any pressing reason why it should. As we explained in our consultation paper on the misuse of trade secrets,²⁸ we believe that conduct should not be criminalised unless it is shown that this is *necessary* (and would be effective). We do not consider that necessity has been demonstrated outside the areas already covered by deception offences, together with certain specific extensions we discuss in Part VII below.

6.30 Our provisional conclusion, therefore, is that a general deception offence would extend the law too far, and in too indeterminate a way, to be justifiable in

²⁴ In each of these examples, the consequences of D's conduct would appear to qualify as "loss" within the meaning of the Theft Act 1968. Section 34(2)(a), which defines "gain" and "loss", is reproduced in Appendix B. "Loss" includes "parting with what one has", which would presumably include the higher price that V has to pay the alternative supplier in case (2), and "not getting what one might get", which in cases (1), (3) and (4) would seem to include the money that, but for the deception, the victims would or might have received. However, under the existing legislation, an intent to cause "loss" is sufficient only in certain comparatively narrow circumstances – for example, where the deception results in the execution of a valuable security.

²⁵ For instance, South Africa, where the requirement of "prejudice" is not confined to financial or proprietary harm (Hunt and Milton, *South African Criminal Law and Procedure*, vol II (2nd rev ed, 1989) p 713); and the Malaysian and Singapore Penal Codes, which require "damage or harm ... in body, mind, reputation, or property" (section 415(b) of each Code).

²⁶ *Kirkwood* (1983) 5 CCC (3d) 393.

²⁷ Case (4) might well amount to an offence under the law of consumer protection; but the question is whether it should amount to criminal fraud.

²⁸ *Legislating the Criminal Code: Misuse of Trade Secrets* (1997) Consultation Paper No 150, para 3.2.

principle. If lacunae exist in the law of deception – as we believe they do – they are best closed by specific reforms targeted at the specific lacunae that have been identified. **We provisionally reject the option of creating a general deception offence.** In the next Part we consider how, without resort to such an offence, the defects of the law of deception might be rectified.

PART VII

AN EXTENDED LAW OF DECEPTION

- 7.1 In this Part we consider ways in which, without resorting to a *general* deception offence, the existing deception offences might usefully be extended. First we consider whether it should be an offence to bring about, by deception, certain consequences which are not caught by any of the existing offences, or to obtain property by deception with no intention permanently to deprive its owner of it. Next we discuss possible difficulties arising out of a requirement that particular consequences be caused *by* deception. Then we consider whether liability for deception should continue to require a separate element of dishonesty. Finally we discuss possible ways of strengthening the law of deception as a practical weapon for prosecutors.
- 7.2 In this Part we assume that the concept of deception itself would remain unchanged. That assumption is critically examined in Part VIII below.

SUBSTANTIVE EXTENSIONS TO THE EXISTING OFFENCES

- 7.3 In this section we consider possible extensions to the substantive ambit of the existing offences of obtaining property and services by deception.

Obtaining property

The Preddy problem

- 7.4 We discussed in Part II the application to financial markets of the problem identified in *Preddy*¹ in relation to bank accounts.² From that discussion it appears that there is at least the *possibility* that a real and immediate problem could arise. The risk alone is sufficient to persuade us that the law should be amended.
- 7.5 But, perhaps more important than the possible immediate problem, we consider that the criminality of fraud in such markets should not depend on what are essentially the accidental features of the contractual relations underpinning the exact mechanisms of the financial system. The complexity of financial markets is such that the true legal analysis of the relationships involved is difficult enough now. It is harder still to predict what will happen even in the comparatively near future. That the *Preddy* problem would arise was entirely predictable, and was predicted by commentators on the Theft Acts. There is no reason to suppose that a similar lacuna in the *law* is awaiting discovery. What is not at all predictable, however, is how the financial markets will evolve. Thus it is impossible to tell in advance whether future market structures may result in transactions subject to the *Preddy* problem. Arguably it is for those who develop such market structures to take this risk into account; but we consider that this is not the right approach. If efficiency in the financial markets requires a particular structure, that structure should not be precluded by technical deficiencies in the criminal law.

¹ [1996] AC 815.

² See paras 2.38 – 2.50 above.

- 7.6 The reform necessary to protect markets in the way we consider necessary need only be minimal. Section 15 of the Theft Act 1968 could be extended so as to catch deceptions which cause another to *lose* his or her property, irrespective of whether anyone else *obtains* it. This would strike at the root of the *Preddy* problem, rather than merely correcting a particular instance of it. The new offence of obtaining a money transfer by deception would become largely³ redundant.
- 7.7 We see no difficulty in principle in making this change. The offence of theft requires only that the defendant *appropriate* property belonging to another: it is immaterial whether he or she, or anyone else, *obtains* it. Destroying the property is certainly sufficient (though in the case of tangible property this would normally be charged as criminal damage). The focus of the offence is on the loss sustained by the victim. There is normally a corresponding gain to the defendant, but that is incidental. Similarly we believe that in principle it should clearly be criminal to induce a person by deception to destroy his or her own property – for example, by extinguishing a chose in action. **We provisionally propose that, for the purposes of the offence of obtaining property by deception, it should be sufficient that the person to whom the property belongs is deprived of it by deception, whether or not anyone else obtains it.**

The requirement of intention permanently to deprive

- 7.8 At present a person who by deception obtains property belonging to another does not commit an offence if he or she does not intend permanently to deprive the other of the property.⁴ We must now consider whether this requirement should be retained.

THEFT AND DECEPTION

- 7.9 This paper is not directly concerned with theft, but it is not practicable to discuss this issue without reference to theft as well as deception. Nothing we say in this paper will prejudice what we might say in a consultation paper on theft, and any conclusions should therefore be treated, in respect of theft, as doubly provisional; but clearly one would expect that similar considerations would apply.
- 7.10 Nevertheless, it may be arguable that there are differences between theft and obtaining property by deception which would justify the abolition of the requirement in the latter though not the former. For instance, it is at least arguable that the law already distinguishes between a result brought about by deception and one brought about in any other way, even dishonestly. Section 2(1)(b) of the Theft Act 1978 makes it illegal by deception to induce a creditor to wait for payment, with intent to make permanent default, whereas simple non-payment, however dishonest, is not illegal. More generally, the argument that the removal of this requirement would amount to the criminalisation of mere unauthorised borrowing does not, intuitively, seem applicable where the property has been obtained by means of a direct lie. Another point which may be of some significance is that the maximum penalty for theft (seven years' imprisonment) is now lower than that for

³ To render it wholly redundant a further amendment would be necessary: see paras 8.21 – 8.23 below.

⁴ See para 2.18 above.

obtaining property by deception (ten years).⁵ These considerations suggest that a distinction between theft and deception might be justified on the basis of the greater *efficacy* of deception in achieving dishonest ends.⁶

- 7.11 We are less persuaded by arguments that the law should recognise a significant and general difference in the moral blameworthiness of theft and deception.⁷ Even if, other things being equal, obtaining by deception is worse than theft, factors such as the value of the property or the vulnerability of the victim will in practice be far more important. In our view the difference is not a foundation upon which an important legal distinction should be erected.

ARGUMENTS FOR THE REQUIREMENT

- 7.12 That a thief should have an intention permanently to deprive the owner of possession was part of the common law of larceny, and was incorporated in the definition of larceny in the Larceny Act 1916.⁸ The CLRC considered that the requirement should be retained in the new offence of theft. One reason given was that “an intention to return the property, even after a long time, makes the conduct essentially different from stealing”.⁹ The Committee accepted that this was not an argument against the creation of a specific offence of temporary deprivation (as indeed it would not be to the creation of a general dishonesty offence). More generally, the Committee thought, it would involve a considerable extension to the existing law without any great need having been demonstrated. It would allow the criminalisation of trivial cases, leading to such social evils as

⁵ Criminal Justice Act 1991, s 26(1). But the comparison between the offences does not seem to have figured in the debates in Parliament on the change.

⁶ Jonathan Swift made a similar point in *Gulliver's Travels* (1726):

There are some laws and customs in this Empire [Lilliput] very peculiar, and if they were not so directly contrary to those of my own dear country, I should be tempted to say a little in their justification. It is only to be wished, that they were as well executed. ...

They look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death; for they allege, that care and vigilance, with a very common understanding, may preserve a man's goods from thieves, but honesty hath no fence against superior cunning: and since it is necessary that there should be a perpetual intercourse of buying and selling, and dealing upon credit, where fraud is permitted or connived at, or hath no law to punish it, the honest dealer is always undone, and the knave gets the advantage. I remember when I was once interceding with the King for a criminal who had wronged his master of a great sum of money, which he had received by order, and ran away with; and happening to tell his Majesty, by way of extenuation, that it was only a breach of trust; the Emperor thought it monstrous in me to offer, as a defence, the greatest aggravation of the crime: and truly, I had little to say in return, farther than the common answer, that different nations had different customs; for, I confess, I was heartily ashamed.

⁷ For the academic debate on this issue, see P R Glazebrook, “Thief or Swindler: Who Cares?” [1991] CLJ 389; Stephen Shute and Jeremy Horder, “Thieving and Deceiving: What is the Difference?” (1993) 56 MLR 548; Neil MacCormick, “What is Wrong With Deceit?” (1982–85) 10 Sydney LR 5.

⁸ Section 1(1).

⁹ CLRC Eighth Report, para 56.

quarrelling families threatening each other with prosecution, undeserved convictions of students for mildly anti-social behaviour, and the waste of police time.¹⁰ No distinct reason was given for maintaining the requirement in the offence of obtaining property by deception.¹¹

7.13 On the other hand, the CLRC's general deception offence (clause 12(3) of the draft Bill) would have made it criminal, among other things, to obtain property temporarily by deception. Far from it being necessary to avoid catching trivial cases, part of the *purpose* of this offence was to cover "minor cases such as obtaining the loan of an article or obtaining a service, without property".¹²

7.14 In one other area (not involving deception) the CLRC extended liability to those with an intention only temporarily to deprive. Included in the draft Bill was a clause to criminalise the unauthorised borrowing of vehicles and vessels.¹³ Subsequently added was a provision criminalising the temporary removal of articles from places open to the public.¹⁴ The first replicated (with amendments) an offence first introduced in 1930 to criminalise the taking and abandonment of motor vehicles.¹⁵ The second was inspired, at least in part, by public outrage at the acquittal on a charge of larceny of a man who took a painting from the National Gallery, returning it four years later.¹⁶ Although an intention permanently to deprive was necessary before the 1968 Act, the law recognised three situations in which an intention *counted* as an intention permanently to deprive. They were described by J R Spencer as the "ransom principle" (an intention to restore the property only on payment), the "essential quality principle" (an intention to restore it only after a fundamental change of character) and the "pawning principle" (an intention to pawn it, hoping to redeem it but knowing it may not be possible to do so).¹⁷ The CLRC intended that these features of the law should be retained, but did not think it necessary to make express provision to that effect.¹⁸

¹⁰ *Ibid.*

¹¹ *Ibid.*, para 89.

¹² *Ibid.*, para 96. The CLRC observed that "it is not necessarily an objection to a Bill that it omits to provide for some kinds of conduct comparable with others for which it does provide": para 100(v).

¹³ Theft Act 1968, s 12.

¹⁴ Theft Act 1968, s 11.

¹⁵ Road Traffic Act 1930, s 28.

¹⁶ CLRC Eighth Report, para 57(ii). He was convicted of stealing the frame, which he had apparently destroyed or abandoned.

¹⁷ "The Metamorphosis of Section 6 of the Theft Act" [1977] Crim LR 653.

¹⁸ CLRC Eighth Report, para 58. In fact the CLRC described a broader principle – "where the offender intends to do something with the property which for practical purposes is equivalent to permanent deprivation" – and saw the three principles enunciated by J R Spencer as *examples* of the general rule, thus presumably allowing for the possibility of further examples being identified. The original version of s 6 was much closer to this approach, referring to "any dealing with it that amounts (or substantially amounts) to a complete usurpation as against [the owner] of the property": see J R Spencer, *op cit*, p 656. The article demonstrates that the intention of s 6 was merely to preserve the common law, whatever the obscurity of its drafting might suggest.

The Government thought otherwise, and introduced a clause which became section 6 of the Theft Act 1968.¹⁹

The labelling argument

- 7.15 When the Theft Bill was before the House of Lords in 1968, Lord Dilhorne successfully moved an amendment to remove the requirement of intention permanently to deprive in the definition of theft.²⁰ In the debate, Lord Morris of Borth-y-Gest said he thought that the CLRC's view, that an intention to return the property "makes the conduct essentially different from stealing",²¹ was right in the popular understanding of the meaning of theft. Viscount Dilhorne, and other peers, disagreed. The definitions of "steal" and "theft" in the Oxford English Dictionary do not include the requirement. It seems doubtful that the popular use of these words would preclude the abolition of the requirement. In any event, while the legal definition of such a term should no doubt be broadly congruent with popular usage, it need not be identical.²²

The triviality argument

- 7.16 That the removal of the requirement would catch trivial forms of conduct is a criticism we do not presently consider significant. Broadly drawn property offences are bound to criminalise the trivial. We argue below²³ that the triviality of the defendant's conduct is not in itself a good reason for exempting it from criminal liability. Other things being equal, of course, temporary deprivation can never be worse than permanent deprivation, and will usually be *less* serious.²⁴ But this does not mean that it cannot be serious. If the present rule prevents or hinders the prosecution of serious conduct, we do not think it can be justified merely on the ground that a different rule would permit the prosecution of trivial conduct.

The wrongfulness of temporary deprivation

- 7.17 If a person is temporarily deprived of his or her property, he or she wrongly suffers loss of *some* sort. In the first place, there is the straightforward loss of use of the property – or at least of the liberty to use it or not, as the owner chooses. If the article is one which produces a profit, the owner loses that profit forever. If it is an article with a non-economic use, the owner must either forgo that use, which will generally have a value (because otherwise he or she would not have spent money

¹⁹ Glanville Williams in "Temporary Appropriation Should be Theft" [1981] Crim LR 129 mentions three other exceptions to the exclusion of temporary deprivation: Theft Act 1968, s 20(1) (relating to, inter alia, the concealment of documents), s 32(1) and Sch 1, saving the law relating to catching and throwing back fish; and Post Office Act 1953, s 53 (postal packets).

²⁰ *Hansard* (HL) 5 March 1968, vol 289, cols 1298–1326.

²¹ CLRC Eighth Report, para 56.

²² For instance, according to the Oxford English Dictionary, "steal", at least in earlier times, had a strong connotation that the act was done secretly; but that is clearly no part of its legal definition today.

²³ Para 7.42.

²⁴ Where it is equally serious, the law as it now stands is likely to regard it as equivalent to permanent deprivation.

on it, or forgone the price to be got by selling it), or spend money to replace it. If the article is returned after it has been replaced, the owner will lose the money spent on the replacement (or the value of the returned original) forever. The returned article will usually have lost some value through the passage of time, or from wear and tear inflicted upon it by the thief or others. Thus even a temporary loss of the property itself will generally result in a permanent loss of some other kind.

- 7.18 Secondly, the person who temporarily deprives another of property exposes the property to the risk of loss. If the property is lost by that person, he or she will not have committed theft or obtaining property by deception, but the loss to the owner will be the same as if an offence had been committed. The position before the Theft Act 1968 was that mere recklessness as to whether the deprivation is permanent was not sufficient. A person who borrowed property for a particular purpose, but then relinquished it without caring whether it was restored to its owner, did not commit the offence. Section 6 of the Act appears to have been intended to replicate the common law.²⁵ But it is notoriously badly drafted and obscure; it may be that it did change the law, and an intention to deal with property in such a way as to make it likely that the property will not be restored to its owner does amount to an intention permanently to deprive.²⁶ In any event, such behaviour should in our view be criminal, and at the moment is only doubtfully so.
- 7.19 Our provisional view is that temporary deprivation of property is wrong in principle, and, unless there is a significant countervailing argument, should be criminal.

THE PRACTICAL EFFECTS OF THE REQUIREMENT

- 7.20 There is, in addition, a family of arguments based on practical considerations in favour of abolishing the requirement. First, the exclusion of an intention temporarily to deprive has led to the invention of specific offences to deal with what clearly is serious conduct. The inevitable result is irrational distinctions and technicalities on the borders between the specific offences and the general exclusion:

Why should it be an offence to make off temporarily with a cart but not with a horse,²⁷ or with a statuette from a public museum but not from an auction sale-room when the public have been invited to view the articles or from a private collection that specific people have been invited to view? Why should the statutory offence be committed by going off with a valuable duck from the grounds of a zoo if the zoo houses some of its exhibits in a building open to the public (eg a parrot-house) but not if the public are left entirely in the open air? Is a church a building “where the public have access in order to view the building or part of it, or a collection or part of a collection housed in

²⁵ J R Spencer, “The Metamorphosis of Section 6 of the Theft Act” [1977] Crim LR 653.

²⁶ See the discussion in A T H Smith, *Property Offences* (1994) paras 6-02, 6-65 – 6-67; *Fernandes* [1996] 1 Cr App R 175; *Marshall* [1998] 2 Cr App R 282.

²⁷ *Neal v Gribble* (1979) 68 Cr App R 4; [1978] RTR 409 [footnote in original].

it,” or is it exclusively a place of worship? In *Barr*²⁸ it was ruled in the Crown Court that public access is given for devotional purposes only, and not “in order to view.” If that is correct for the ordinary church, what about Westminster Abbey?²⁹

7.21 Second, the requirement can in certain circumstances act as an artificial obstacle to prosecution. In *Scott*,³⁰ the defendant had temporarily obtained copies of films from projectionists in order to make pirate copies. He was charged with conspiracy to defraud, which necessitated an appeal to the House of Lords on the question of whether that offence required deception; had intention permanently to deprive not been required, he could simply have been charged with theft or conspiracy to steal. Similarly, in *Marshall*,³¹ touts obtained and sold unexpired London Underground tickets. It was assumed (probably wrongly) that the tickets would be returned to London Underground once exhausted. The Court of Appeal upheld convictions for theft, but only by having recourse to section 6 of the 1968 Act. The court found that, by re-selling the tickets, each tout had “the intention to treat the thing as his own to dispose of regardless of the other’s rights”, because London Underground reserved to itself the sole right to sell tickets. The case involved considerable difficulty, and the court’s use of section 6 arguably went further than Parliament intended. All this could have been avoided had there been no requirement of intention permanently to deprive.

7.22 Third, the existence of the requirement can make it harder to secure convictions against those who *do* have an intention permanently to deprive. This is because it is satisfied if D obtains property by deception with the intention of *replacing* it with some other property of the same value at a later date: the intention to replace the property does not negative D’s intention to deprive V of the property initially obtained. Thus if D obtains money from V by deception, D’s intention to repay the money may be relevant to the issue of dishonesty but is not a defence in itself.³² In fact, where the property obtained by D is money or intangible property, the requirement of intention permanently to deprive will almost inevitably be satisfied. It adds virtually nothing. Unfortunately the distinction between an intention to return the very property obtained (which is a complete defence) and an intention to replace it with property of the same value (which goes only to dishonesty) is not easy for lay fact-finders to grasp. Where D has obtained money by deception, and the jury are directed not to convict unless satisfied that D intended permanently to deprive V of the money, and there is reason to suppose that D might eventually have repaid V (albeit with *different* money of the same value), it is not altogether surprising if D secures a legally unwarranted acquittal.

²⁸ [1978] Crim LR 244 [footnote in original].

²⁹ Glanville Williams, “Temporary Appropriation Should be Theft” [1981] Crim LR 129, 131. A T H Smith is also critical of the requirement: *Property Offences* (1994) p 191.

³⁰ [1975] AC 819.

³¹ [1998] 2 Cr App R 282.

³² Except in the unlikely event that D intends to return the actual banknotes or coins received from V.

POSSIBLE ALTERNATIVES

Significant practical detriment

- 7.23 An alternative to simply abolishing the requirement of intention permanently to deprive would be to replace it with some less restrictive requirement. A proposal made in the context of dishonesty seems to us to be of interest here. In an Australian case, McGarvie J suggested that

an accused person, obtaining property by deception, obtains it dishonestly if he is then conscious that by obtaining it he will produce a consequence affecting the interests of the person deprived of it; and if that consequence is one which would be detrimental to those interests in a significant practical way.³³

- 7.24 This suggestion now forms part of the law of theft in the Australian Capital Territory, where the relevant provision reproduces section 2(1) of the Theft Act 1968, but adds another circumstance in which a defendant's appropriation is not to be regarded as dishonest – namely where

he or she appropriates the property in the belief that the appropriation will not cause any significant practical detriment to the interests of the person to whom the property belongs in relation to that property.³⁴

- 7.25 Professor D W Elliott has also taken up McGarvie J's formulation and suggested that it should be adopted by a reformed law of theft and deception in England and Wales.³⁵ His version, however, operates by abolishing the dishonesty requirement altogether, and simply providing that a person is not guilty of obtaining property by deception if he believes that the obtaining is not detrimental in a significant practical way to the interests of the person from whom the property is obtained.³⁶

- 7.26 Thus divorced from the requirement of dishonesty, it seems to us that this formulation might be appropriate as a partial replacement for the requirement of intention permanently to deprive. It could be argued that the exclusion of temporary interferences with the property of others is an indirect, and thus unsatisfactory, way of avoiding the criminalisation of minor interferences, whereas a requirement of significant practical detriment achieves the same aim more directly and therefore more accurately. On the other hand, such a requirement might introduce further uncertainty into the law: it would be less certain than either the requirement of intention permanently to deprive or the simple abolition of that requirement. In one respect, it might *narrow* the reach of the criminal law.

³³ *Bonollo* [1981] VR 633, 656. Although giving in a full judgment this, his preferred view, McGarvie J concluded that he was bound by the decision in *Brow* [1981] VR 783 and therefore was obliged to withdraw the judgment.

³⁴ Crimes Act 1900 (NSW) s 96(4)(b), as amended in its application to the Australian Capital Territory by the Crimes (Amendment) Ordinance (No 4) 1985 (ACT). As the language suggests, this provision relates only to theft: in the Australian Capital Territory there is no separate offence of obtaining property by deception.

³⁵ "Dishonesty in Theft: A Dispensable Concept" [1982] Crim LR 395.

³⁶ Similarly, in respect of theft, he would remove the dishonesty requirement from s 1, site the existing contents of s 2(1) in a new s 1 ("appropriation is not theft if ...") and place the requirement of significant practical detriment in what is now s 3 ("Appropriation").

It would be arguable that a person who obtains money dishonestly, intending to repay an equivalent sum (but not the same coins or notes) does not intend a significant practical detriment.

Specific exclusions

- 7.27 An alternative approach would be to identify specific areas in which temporary deprivation should *not* be criminal. Such an approach was proposed by Professor Glanville Williams.³⁷ He suggested excluding a person who borrows another's property with no intention to prevent the other from using or enjoying it, or to use it to commit another offence,³⁸ and a person who is allowed to have temporary possession of the property and *either* uses it in an unauthorised way³⁹ *or* retains it beyond the time allowed.
- 7.28 We see some advantages in this approach, as it would target particular kinds of conduct which arguably justify the requirement of intention permanently to deprive. On the other hand, specific exemptions would be appropriate only if they really constituted non-trivial conduct which should not be criminal; and that we tend to doubt. The defendant's conduct will not be criminal anyway if he or she thinks that the owner consents to what is done, or would consent if he or she knew the circumstances.⁴⁰ Only if the defendant knows that this is not the case will it be necessary to rely on the absence of an intention permanently to deprive; and if the defendant knows this, we think it debatable whether an exemption is really justified.

CONCLUSION

- 7.29 **We invite views on whether the requirement of intention permanently to deprive in the offence of obtaining property by deception should be**
- (1) **retained;**
 - (2) **replaced with a requirement of intention to cause significant practical detriment to the person to whom the property belongs;**
 - (3) **abolished, subject to exceptions for specific circumstances (and if so, what circumstances); or**
 - (4) **abolished altogether.**
- 7.30 **Of these options, we provisionally propose the last.** This proposal would inevitably criminalise certain comparatively trivial conduct which at present is not criminal at all, and would thus increase the number of cases in which prosecutors would be called upon to decide whether a prosecution was in the public interest. **We invite views in particular on the desirability of the greater reliance on prosecutorial discretion which this proposal would involve.**

³⁷ "Temporary Appropriation Should be Theft" [1981] Crim LR 129.

³⁸ Eg borrowing a neighbour's lawn-mower against his or her wishes.

³⁹ Eg using an employer's property to make a secret profit.

⁴⁰ Theft Act 1968, s 2(1)(b).

Obtaining services

- 7.31 It is arguable that section 1 of the 1978 Act draws the line in the right place by making it an offence to obtain services only where the service is provided on the understanding that it has been, or will be, paid for. This requirement serves to prevent the offence from catching acts of a social rather than an economic character, which in our view is a desirable objective. But it is open to two objections.
- 7.32 First, a service of an economic character may be provided on the understanding that it will *not* be paid for, because the deception results in the usual payment being waived. For example, D obtains a free bus ride by pretending to be a pensioner and to have left her bus pass at home. This would not fall within section 1, though D might be said to have obtained an “exemption” from payment within the meaning of section 2(1)(c). Our provisional view is that it should make no difference to D’s liability whether V thinks that D has paid or is going to pay, as long as D knows that V *would* have expected D to pay but for the deception.
- 7.33 Second, some services are of an economic character, although the benefit which their provider hopes to receive is more subtle than simply being paid for providing them. Thus it was held in *Halai*⁴¹ that the defendant had not committed the offence under section 1 by opening a building society account with a bad cheque, because building societies do not charge for the opening of an account. But they do not open accounts for social reasons either. Our provisional view is that the conferring of a benefit should qualify as a “service” not only where it is expected that the benefit has been or will be directly paid for, but more generally where it is conferred with a view to financial gain, for the person conferring it or anyone else.
- 7.34 **We provisionally propose that, for the purposes of the offence of obtaining services by deception, the definition of “services” should be extended to include**
- (1) a benefit conferred with no understanding that it has been or will be paid for, provided that, but for the deception, it would not have been conferred without such an understanding; and**
 - (2) any benefit conferred with a view to gain.**

CAUSING A CONSEQUENCE BY DECEPTION

- 7.35 Any offence of bringing about an event *by* deception requires proof not only that both the deception and the event occurred, but that the event was a result of the deception. This requirement sometimes gives rise to two types of difficulty under the existing law. The first arises where the consequence would have occurred in any event, because the deception is as to a matter which is not the primary concern of the person deceived. In *Laverly*,⁴² for example, the defendant changed the number plates of a stolen car and sold it to an innocent purchaser. It was held

⁴¹ [1983] Crim LR 624. This point is not affected by the reversal of *Halai* (by *Cooke* [1997] Crim LR 436, and the Theft (Amendment) Act 1996) on the question whether the obtaining of a loan is an obtaining of “services”.

⁴² [1970] 3 All ER 432.

that he had not obtained the price by falsely representing that the number on the plates was the car's original registration number, because there was no evidence that the car's registration number had had any influence on the purchaser's decision to buy it.⁴³

7.36 The second difficulty is that, even where the consequence would not have occurred but for the deception, it may be debatable whether it can be said to have been *caused by* the deception, because the nexus between them is too remote. This problem can arise where the direct result of the deception is not the required consequence itself, but a state of affairs which enables the defendant to bring that consequence about. For example, a person who deceives a bookmaker into accepting a bet does not obtain the winnings by deception, but by correctly predicting the result.⁴⁴

7.37 In some cases (including this last example) the deceiver's conduct is now caught by the offence of obtaining a pecuniary advantage by deception.⁴⁵ Even where it is not, the current tendency is to regard the issue as one for the fact-finders. Thus in *King*⁴⁶ the Court of Appeal upheld convictions for attempting to obtain money by deception where bogus tree-surgeons offered to remove trees from an elderly widow's garden on the pretext that they were dangerous. The jury were entitled to reject the defence that the defendants' intention was to obtain the money not by deceiving the widow but by removing the trees. Arguably, therefore, the legal *concept* of causation is adequate, since it does not preclude a conviction in cases such as *King*. But a different jury, on identical facts, might have accepted the defence. Though justifiable if properly applied, the requirement of causation may perhaps be open to misunderstanding, and may therefore result in unjustified acquittals.

7.38 **We invite views on whether much difficulty arises in practice from the requirement in the deception offences that the specified result be brought about *by* deception; and, if so, we invite suggestions as to how that requirement might usefully be modified.**

DISHONESTY

7.39 In all of the current deception offences, dishonesty is an element. To use the distinction developed in Part III, the role played by dishonesty in these offences is a *negative* one. Obtaining things by deception is *prima facie* wrongful, and the requirement of dishonesty operates to exclude from liability that which one would expect to be a crime. In this section, we consider whether the deception offences

⁴³ Another example of this problem arises where the deception consists in the unauthorised use of a credit card or similar payment instrument: since the merchant will rarely care whether the customer has authority to use the card, it may be debatable whether the goods or services are obtained *by* the customer's deception on that point. But the real difficulty here is in treating the customer's conduct as a deception in the first place: see paras 8.9 – 8.16 below. Once one accepts that the use of the card is a deception, there is no great difficulty in treating the merchant's acceptance of it as a result of that deception.

⁴⁴ *Clucas* [1949] 2 KB 226.

⁴⁵ Theft Act 1968, s 16.

⁴⁶ [1987] QB 547.

should continue to require some form of negative dishonesty element. We are concerned in this part with deception offences, not theft. However, it would be idle to pretend that our consideration of this area can be conducted in isolation from theft and other offences of which dishonesty is an element. It would obviously be undesirable for the concept of dishonesty to have differing meanings in different offences.⁴⁷ Even if the concept were to be defined and re-labelled, there would be at least some advantage in retaining consistency of meaning. While the focus of this section is on the law of deception, therefore, we would not wish to discourage consultees from having theft and other offences in mind when responding. Nonetheless, the issue will have to be re-visited in the context of our future work on theft and other offences; and we will not necessarily regard anything that consultees may have to say on theft or other offences as their last word on the subject.

7.40 It is possible to identify several different functions that a negative element of dishonesty (or some similar requirement) might serve in a criminal offence, and does already serve in the law of theft and deception. Such a requirement may serve to negative liability where

- (1) the defendant's conduct, though morally blameworthy, is too trivial to justify criminal liability;
- (2) the defendant's conduct is not morally blameworthy at all; or
- (3) because of a mistake of law,⁴⁸ the defendant believes that he or she is only exercising his or her legal rights.

We consider each of these functions in turn.

Triviality

7.41 One of the arguments against a general deception offence considered by the CLRC was that such an offence "would cover many minor cases of deception of various descriptions which public opinion has not regarded, and would scarcely now regard, as requiring the application of the criminal law to them". If this is a valid criticism, one way of mitigating it would be to include a requirement of dishonesty; and this is what the CLRC proposed. If the defendant's conduct is too trivial to be thought dishonest, it cannot amount to an offence of which dishonesty is an element.

7.42 We asked above for views on whether the offence of obtaining property by deception should require an intent to do something detrimental to the victim's interests in a significant practical way.⁴⁹ This would amount to an attempt to

⁴⁷ The courts at one time seemed to envisage that this might be the case under the existing law (*McIvor* [1982] 1 WLR 409), but eventually decided otherwise: *Ghosh* [1982] QB 1053, disapproving *McIvor*.

⁴⁸ If the defendant is mistaken about the facts, he or she should in principle be judged on the basis of the facts as he or she believed them to be: *Tolson* (1889) 23 QBD 168; *Williams (Gladstone)* [1987] 3 All ER 411.

⁴⁹ Paras 7.23 – 7.26, 7.29 below.

exclude trivial conduct directly; and it could be extended to the other deception offences as well. However, our provisional view is that the triviality of the defendant's conduct is not *in itself* a good reason for excluding it from the law of dishonesty, any more than the triviality of some assaults justifies excluding them from the law of assault. A prosecutor might well conclude that the public interest does not require a prosecution for conduct which is only trivially dishonest; and, in the event of a conviction, it might be appropriate to discharge the defendant without punishment. But this is quite different from saying that the substantive law should exclude such conduct altogether. We believe that any attempt to do so would introduce an unacceptable degree of uncertainty for no good reason. We provisionally reject the option of including a provision intended solely to exclude conduct which, though blameworthy, is trivial.

No moral blame

- 7.43 In our view this is quite different from the question whether the substantive law of dishonesty should exclude conduct which is not morally blameworthy at all. This is perhaps the most significant function of the requirement of dishonesty in the existing law. In *Feely* Lawton LJ, giving the judgment of the Court of Appeal, said:

It is possible to imagine a case of taking by an employee in breach of instructions to which no one would, or could reasonably, attach moral obloquy; for example, that of a manager of a shop, who having been told that under no circumstances was he to take money from the till for his own purposes, took 40p from it, having no small change himself, to pay for a taxi hired by his wife who had arrived at the shop saying that she only had a £5 note which the cabby could not change. To hold that such a man was a thief and to say that his intention to put the money back in the till when he acquired some change was at the most a matter of mitigation would tend to bring the law into contempt. In our judgment a taking to which no moral obloquy can reasonably attach is not within the concept of stealing either at common law or under the Theft Act 1968.⁵⁰

- 7.44 *Feely* was a case of theft, not deception. In practice, the argument that the defendant's conduct was not dishonest is more likely to be plausible in the case of theft – particularly since *Gomez* decided that the element of appropriation is not negated by the owner's consent. It must be rare that the defendant can admit obtaining a benefit by deception, but claim that it was not a dishonest thing to do. Deception is *prima facie* dishonest.
- 7.45 However, the absence of any negative element of dishonesty would deprive a defendant of any defence in a range of (at least theoretical) circumstances in which most people would regard his or her conduct as morally blameless or even morally preferable. If a person out of kindness compliments his grandfather on a tie-pin he secretly dislikes, it is arguable that he should not be even theoretically open to prosecution if, on the death of his grandfather, his grandmother presents him with the tie-pin – even if he knew that this would or might be the effect.

⁵⁰ [1973] QB 530, 539.

- 7.46 Richard Tur⁵¹ argues that the use of dishonesty, as a moral concept, is necessary because “what may constitute a just excuse is so context-dependent that exhaustive definition must necessarily limit the range of circumstances which might excuse”. Any attempt to offer an exhaustive definition of dishonesty will inevitably result in the conviction of defendants whom the fact-finders consider morally blameless. He attributes the criticisms of *Feely* and *Ghosh*, in part, to an unjustified suspicion of the jury, and emphasises the importance of doing justice in the individual case as against consistency in the criminal law. He appeals to the “robust common sense” of the jury and approves of the role of dishonesty in applying to the law a shared morality.
- 7.47 It would obviously be preferable to avoid criminalising conduct “to which no moral obloquy can reasonably attach”, *if* that can be done without creating undue uncertainty and inconsistency or inviting the introduction of evidence of negligible probative value. But our provisional view is that a requirement of *Ghosh* dishonesty has these drawbacks, and that they are too high a price to pay. It is true that in the deception offences dishonesty is (in the terminology of Part III above) a negative element, and is therefore (in our view) less objectionable than in those offences where it is a positive element. It also has some significant advantages. It provides a general means of avoiding the conviction of those whose acts are not morally culpable, applicable in any number of different contexts which need not be determined in advance. Against that, it can be argued that such protection is fundamentally unreliable. A jury might be disposed to use a negative dishonesty element as a way of acquitting a defendant who is morally blameless. But it might not, and there is no way of challenging a failure to do so. Dishonesty is what the jury says it is.
- 7.48 A negative dishonesty element can also act against the interests of justice, in that it allows those who should be convicted to go free, or at least makes it harder to convict them. It has been said to encourage trials where there would otherwise be a plea of guilty, and to lengthen trials.⁵² In the absence of a negative dishonesty element, guilt would follow automatically from proof or admission of the conduct prohibited. At the moment, it may always be worth a defendant’s while to try to persuade the fact-finders that they should not account him or her dishonest, because (for example) he or she intended to repay the loan obtained by deception, or expected the deception to produce profits for all concerned. Trials may be longer because the limits to evidence which may be relevant to dishonesty are wide and difficult to draw. Were the dishonesty element to be discarded, or confined to specific and properly defined circumstances (such as claim of right), defendants would be denied the option of admitting the facts alleged while asserting that they were in a general sense not dishonest.⁵³ In many cases a guilty defendant would be forced to plead guilty, a highly desirable outcome.

⁵¹ “Dishonesty and the Jury” in A P Griffiths ed, *Philosophy and Practice* (1985) p 75.

⁵² Edward Griew, “Dishonesty: the Objections to *Feely* and *Ghosh*” [1985] Crim LR 341.

⁵³ For example, the police crime prevention officer who admitted taking £700 from an elderly woman he was advising, but apparently put up a defence that he was not dishonest because he was suffering from stress as a result of deaths in his family, and having taken the money immediately wanted to return it: *Police Review* 22 January 1999.

- 7.49 In many serious fraud cases, at least the outline of the transactions involved is not contested. If the law defined the conduct amounting to, say, theft, in many such cases there would in truth be no defence. The question of the defendant's honesty in the *Ghosh* sense would be relevant only to sentence.⁵⁴ If there were no element of *Ghosh* dishonesty, it seems likely that fewer such cases would reach a jury than do at present. Where cases did go before a jury, the questions asked of the jury would be more straightforward, at least in the sense that they would be purely factual. Did the defendant do the things alleged (which, the judge has ruled, would amount to appropriation or obtaining)? Did he or she believe that the owner of the property would consent if he or she knew?
- 7.50 We accept that the realisation of the full advantages to prosecutors that could flow from discarding *Ghosh* dishonesty may depend, at least in part, on ensuring that an appropriate procedural structure is in place. The new emphasis on pre-trial procedures to clarify matters for the jury, exemplified in the recent introduction of appealable preparatory hearings,⁵⁵ is clearly consonant with such an approach; but to go beyond that is beyond the scope of this project.
- 7.51 In addition to our general position in respect of *Ghosh* dishonesty, there are particular problems with an open-ended notion of dishonesty in the context of deception offences. In practice, it may be difficult to disentangle effectively the elements of deception and dishonesty. Many jurors may think that deception is necessarily dishonest – in *Salvo*,⁵⁶ indeed, Fullagar J expressed some puzzlement at the concept of an honest deception. A rare example of a case in which, on the facts, such a claim might have been open is *Talbott*.⁵⁷ The defendant claimed housing benefit, to which she was objectively entitled, by making false declarations and creating false documents. She did not want her landlord to know that she was claiming benefit, and had to adopt these means to claim the benefit without his finding out. The appeal, however, related to whether in these circumstances the deception was operative on the mind of the relevant local authority officer. Adapting the words of the CLRC, the defendant might have argued that, because she was entitled to the benefit, “though the deception may be dishonest, the obtaining is not”; but she did not argue this. Presumably the distinction between deception and dishonesty was either overlooked or felt to be too nice to put before the jury.
- 7.52 More generally, we are not aware of any other area of criminal law which recognises an open-ended defence that the conduct in question is morally blameless. The general approach in English law is for the elements of the offence to spell out the conduct it is sought to criminalise, and similarly to provide defences by specifying excusable forms of conduct which would otherwise be caught. There is no specific requirement of morally blameworthy conduct in the law of (for example) assaults, sexual offences, corruption or criminal damage. Even

⁵⁴ Leading, perhaps, to more frequent and more protracted *Newton* hearings: (1983) 77 Cr App R 13.

⁵⁵ Criminal Procedure and Investigations Act 1996, ss 28–38; Criminal Justice Act 1987, ss 7–10.

⁵⁶ [1980] VR 401, 427.

⁵⁷ [1995] Crim LR 396.

in the case of forgery (an offence closely analogous to deception) a person who satisfies the statutory requirements is guilty of the offence, irrespective of moral blame.⁵⁸ If a bank cashier says that a form needs a customer's husband's signature, and the customer forges that signature in order to save time, knowing that her husband would sign if he were present, it is not a defence that she meant no harm. These offences are defined in such a way that conduct which satisfies their requirements (and does not fall within a recognised general defence) will *normally* be blameworthy; but the element of moral blame is incorporated in the definition of the conduct prohibited, not superimposed upon it. There is always the possibility that blameless conduct may occasionally be caught, but that possibility is dealt with via prosecutorial discretion and sentencing options. It is not clear why theft and deception should be thought unique in this respect.

- 7.53 Our provisional conclusion, therefore, is that, while it would ideally be desirable to exclude morally blameless conduct from the scope of the law of deception, this should not be done by means of a requirement of *Ghosh* dishonesty. **We provisionally propose that the deception offences should cease to require proof of dishonesty as a separate element.**

Claim of right

- 7.54 It is a long-standing principle of the law of larceny and theft that a person does not steal property by taking it in the belief that he or she has a legal right to do so. This is an exception to the general principle that ignorance of the law is no defence. It is now enshrined in section 2(1)(a) of the 1968 Act, which provides that a person's appropriation of property belonging to another is not dishonest if it is done in the belief that that person has in law the right to deprive the other of the property.
- 7.55 A similar principle can be applied to the law of deception. In the absence of any dishonesty element at all, a person could commit a deception offence by obtaining a benefit by deception in the belief that he or she has a legal right to it. The facts of *Salvo*⁵⁹ provide such a case. The defendant sold a car to K, taking in part exchange another car, which he sold to another customer. It then transpired that K had not had title in the part-exchanged car, and the defendant had to perfect the second customer's title. The defendant then discovered that K had put the car he had acquired from the defendant on sale. The defendant bought it with a cheque he intended to dishonour. But before he did so, he consulted a lawyer, who told him that title in the car had not passed and it was really still his. His appeal was upheld: the Crown was required to negative a belief in him that he was legally entitled in all the circumstances to deprive K of possession of the car.⁶⁰ In the absence of any requirement of dishonesty or any similar element, he would have been rightly convicted.

⁵⁸ An even more striking discrepancy is that between forgery and false accounting, which, like deception, is an offence under the Theft Act 1968 (s 17) and similarly requires proof of dishonesty.

⁵⁹ [1980] VR 401.

⁶⁰ Rather than, as the judge had directed the jury, that the Crown must negative a belief that he had a legal right to get the car by the deception in fact practiced.

7.56 The CLRC intended that the defence of “claim of right” should apply to the offence of obtaining property by deception.

Owing to the words “dishonestly obtains”, a person who uses deception in order to obtain property to which he believes himself entitled will not be guilty; for though the deception may be dishonest, the obtaining is not.⁶¹

The Committee considered that what is now section 2(1)(a) would in effect apply to obtaining property by deception as it expressly applies to theft.⁶² That intention has not been realised, as a by-product of *Ghosh* dishonesty.⁶³ The result is a significant inconsistency between theft and obtaining property by deception.

7.57 The Australian state of Victoria adopted from the Theft Act 1968 the definitions of theft, the partial definition of dishonesty in relation to theft and the offence of obtaining property by deception.⁶⁴ The Victorian courts, however, rejected *Ghosh* dishonesty, and concluded that, for the purposes of obtaining property by deception as for theft, “dishonestly” meant without a claim of right.⁶⁵

7.58 Our provisional view is that it should be a defence to any deception offence that the defendant believes that he or she has a legal right to the thing obtained. We think this defence should be available if the defendant believes either that he or she *already* has a right to the thing in question (and uses deception as a way of exercising that right), or that he or she *becomes* entitled to it by virtue of the very transaction secured by the deception. Suppose, for example, that D induces V, a dealer, to buy goods by means of a deception as to their nature or value.⁶⁶ Many non-lawyers would wrongly assume that the law expects dealers to know their own business, and that D therefore has a legal right to the purchase price. If D believes this, we think D should have a defence. And we think the same principle should apply where D *obtains* nothing, but merely brings about a specified *consequence* by deception – for example, under our proposal for the extension of the offence of obtaining property by deception, where D does not obtain V’s property but merely induces V to part with it or destroy it. In such a case we think it should be a defence that D believes he or she has a right to secure that consequence by deception.

⁶¹ CLRC Eighth Report, para 88.

⁶² *Ibid.*

⁶³ Edward Griew, “Dishonesty: The Objections to *Feely* and *Ghosh*” [1985] Crim LR 341 (his criticism A10).

⁶⁴ Sections 1, 2(1) and 15 of the Theft Act correspond to ss 72, 73(2) and 81 of the Victorian Crimes (Theft) Act 1973.

⁶⁵ *Salvo* [1980] VR 401; *Brow* [1981] VR 783; *Bonollo* [1981] VR 633. In *Salvo*, Fullagar J considered that s 2(2)(b) (as well as, obviously, s 2(1)(c)) applied only to theft. The CLRC appears to have considered that it applied also to the deception offences (Eighth Report, para 88) and, as we suggest in Part III, it may have been part of what was covered by “fraudulently and without a claim of right” before the 1968 Act.

⁶⁶ Cf *Williams (Jean-Jacques)* [1980] Crim LR 589, which concerned the offer of obsolete foreign banknotes to a bureau de change.

- 7.59 **We provisionally propose that it should be a defence to any of the deception offences that the defendant secures the requisite consequence in the belief that he or she is legally entitled to do so, whether by virtue of the deception or otherwise.**

EFFECTIVE PROSECUTION

- 7.60 In Part IV we referred to several ways in which it is claimed that a general fraud offence would assist in the more effective prosecution of conduct which is already criminal – namely by
- (1) accurately representing the criminality of the conduct alleged;
 - (2) enabling the whole of a complicated fraud to be charged in one count, rather than overloading the indictment with counts of specific offences;
 - (3) rendering admissible all the evidence relating to the overall fraud; and
 - (4) ensuring that the court has adequate powers of sentencing.
- 7.61 We argued that, while these are desirable objectives, a general fraud offence would not necessarily achieve them; and, conversely, that it might be possible to achieve them *without* resorting to a general fraud offence. In parts V and VI we provisionally concluded that neither form of general fraud offence would be desirable, but that the law of deception should be extended in such *specific* respects as may be thought necessary. So far in this Part we have proposed several such extensions. It is obvious that these proposals would in themselves make convictions easier to secure, since the first prerequisite for a conviction is that the defendant's conduct should be criminal as a matter of substantive law. But we must now consider whether the extended law of deception that we propose, despite falling short of a general fraud offence, can nevertheless be framed in such a way as to facilitate the effective prosecution of that conduct which is criminal as a matter of substantive law, as well as extending the range of conduct that falls within this category.
- 7.62 The four kinds of procedural advantage that we identified as being claimed for a general fraud offence are, in our view, essentially different ways of expressing the same point: namely that prosecutors should not be required to treat a fraud as if it were a single event, like an assault. Many frauds consist of a continuing course of conduct. They involve a number of dishonest acts in relation to different targets and different victims. Where a defendant has obtained money from 20 different people by means of an identical deception, it would simplify the proceedings if the prosecution could charge this whole course of conduct in a single count, giving details of the individual instances in the particulars of offence or a schedule.
- 7.63 Under the present law this course may be precluded by the rule against duplicity (that is, the charging of more than one offence in a single count); but in some cases it is possible. Where the fraud takes the form of business dealings by a British company, a number of fraudulent transactions can be encompassed in a single count of fraudulent trading. The reason is that in its nature the offence is a continuing offence, in the sense that its actus reus describes a general course of conduct which is composed of the individual fraudulent transactions.

7.64 A similar result can be achieved by charging a conspiracy to enter into the individual transactions. This might be either a common law conspiracy to defraud or (if the individual transactions involve substantive offences) a statutory conspiracy under section 1 of the Criminal Law Act 1977. Again the rule against duplicity is not infringed. In this case the theoretical justification is that the offence consists in the agreement rather than the fraudulent transactions themselves. But this is something of a fiction. Conspiracy is generally charged where at least some of the fraudulent transactions agreed upon have actually been effected. The real value of the charge to the prosecution lies not in the fact that even an unimplemented agreement is criminal, but rather in the opportunity it offers for incorporating an entire fraudulent scheme in a single count.

Such a charge gives [prosecutors] the maximum room for manoeuvre during the trial. The fact that they fail to prove one part of their case is immaterial if they adduce other evidence which still goes to prove the general agreement. No difficulties as to similar fact evidence are likely to arise, since all relevant conduct goes to the conspiracy. Evidence inadmissible on a substantive charge may become admissible on a conspiracy. Where the organisers of crimes have deliberately kept themselves in the background, a jury may more readily understand their guilt of conspiracy than their involvement in individual offences committed by others. If sample counts are laid, the defendant can only be sentenced on the basis of those counts (unless he asks for other offences to be taken into consideration). If a conspiracy count is included, the agreement will cover all the offences committed in pursuance of it, and the trial judge can form his own view whether to sentence on the basis that the defendant committed all or only some of them.⁶⁷

7.65 By contrast, theft and the deception offences generally consist in individual fraudulent acts, each of which must usually be charged in a separate count. But there is some authority for a flexible approach to duplicity. In some circumstances, for example, a single count can encompass what are in reality a number of separate thefts.⁶⁸ Thus a number of similar thefts over a period of time can sometimes be charged as a continuous appropriation of the aggregate amount.⁶⁹ In *DPP v Merriman*⁷⁰ Lord Diplock went further:

The rule against duplicity ... has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment.

⁶⁷ *Arlidge and Parry on Fraud* (2nd ed, 1996) para 15-014.

⁶⁸ See *Archbold*, paras 1-143 to 1-144.

⁶⁹ *Henwood* (1870) 11 Cox CC 526. Cf *DPP v McCabe* [1992] Crim LR 885 (one offence of stealing 76 library books from one or more of 32 libraries).

⁷⁰ [1973] AC 584, 607. Lords Reid and Salmon agreed.

But the appeal was not directly concerned with the application of the rule against duplicity, and this dictum cannot be taken literally. Where the defendant obtains money from 20 victims by identical deceptions, it may be fair to describe those acts as “forming part of the same ... criminal enterprise”; but we think it unlikely that, under the present law, a count charging the 20 obtainings as one offence would survive challenge.

- 7.66 Our provisional view is that the rule against duplicity is based on considerations of fairness to the defence. It is arguable that, provided the defence are given adequate notice (in the form of particulars, schedules or the prosecution’s case statement) of what is alleged, there is no reason why it should be any less acceptable to charge several obtainings in one count of obtaining by deception than in one count of fraudulent trading or conspiracy. If the latter course is not unfair to the defence then neither is the former.
- 7.67 One way to achieve that end might be to create a deception offence which can be committed by engaging in a continuing course of conduct which involves individual instances of *any* of the existing substantive deception offences. A requirement that the defendant should have *actually engaged in* such a course of conduct would mean that the offence was not a kind of “one-person conspiracy”: the mere *planning* of the fraudulent scheme would not itself be criminal. It would not, however, be necessary for the prosecution to prove every one of the individual offences alleged: such a requirement would deprive the new offence of most of its practical value. The individual offences would, in effect, amount to *particulars* of the allegation of the continuing course of conduct. According to *Brown (K)*,⁷¹ a jury may convict on a particular count without agreeing on all the allegations made by the prosecution in relation to that count, as long as they agree on enough of the allegations to constitute the offence; but on those they must be unanimous, subject only to the rules on majority verdicts. This is not always an easy test to apply;⁷² but it would not necessarily be any harder to apply in the context of a “course of conduct” offence than in those contexts (such as fraudulent trading and conspiracy) where it already falls to be applied.
- 7.68 We do not believe that the prosecution should be able to lump several *unrelated* offences together in one count. That cannot be done merely by charging a conspiracy, because a charge of conspiracy to commit unrelated offences would normally be treated as alleging more than one conspiracy, and thus as infringing the rule against duplicity; and we think it unlikely that it would be permitted in the case of fraudulent trading either.⁷³ We suggest that an offence of continuing deceptive conduct would have to be confined to the case where, in Lord Diplock’s

⁷¹ (1984) 79 Cr App R 115.

⁷² We note the suggestion in *Archbold*, paras 4-392 to 4-393, that the courts have given the rule in *Brown* “an extremely restricted application”, and have in a number of cases avoided the issue.

⁷³ We know of no case law on this point in fraudulent trading, but think it unlikely that a single count charging a number of quite disparate fraudulent schemes involving different victims, methods and so on would not be duplicitous merely because the schemes used the same corporate vehicle.

words, a defendant is alleged to have committed a number of similar offences as “part of *the same* transaction or criminal enterprise” (our emphasis).

- 7.69 This would not, of course, be an easy distinction to apply in every case. Where a defendant had committed similar but not identical deceptions against different victims at different times, and the prosecution sought to charge this conduct as a continuing course of deception, the court would need to consider whether it was a single criminal enterprise or a number of different ones. But this is effectively the same decision that already has to be taken if the prosecution charge such a course of conduct as fraudulent trading or conspiracy. The rule against duplicity applies to these offences, so it remains essential to identify and charge only *one* fraudulent course of conduct⁷⁴ in one count. The offence we suggest would not involve any great departure from existing principles, only the application of those principles to offences to which they have not hitherto been applied.
- 7.70 The problem was considered by the Law Reform Commission of Hong Kong in its recent report. Its fraud sub-committee had proposed a general deception offence which would be committed only where one person defrauded another by means of a “scheme”. A “scheme” would be defined as “a scheme, plan, design or programme of action, whether of a repetitive or non-repetitive nature”. It was argued that

this approach had the advantage of removing the illogicality of being able to charge a continuing fraud offence only when there was more than one person acting in dishonest combination, and that it allowed a single charge to reflect the full criminality of the accused’s conduct without having to resort to sample counts.⁷⁵

- 7.71 The Commission rejected this proposal.

The concept seems to us fraught with uncertainty and falls into the trap ... of confusing procedural with substantive objectives in the formulation of a fraud offence. It would, we think, be difficult to state with certainty what conduct would fall within the scope of a scheme. On one view, the proposed definition is so wide as to encompass almost any conduct calling for conscious action. As such, it remains open to the same criticism which is levelled at the breadth of the existing offence of conspiracy to defraud.⁷⁶

- 7.72 As a criticism of the particular proposal put forward by the sub-committee, this seems to us to be valid only in part. The criticism of excessive *breadth* seems to us to be misconceived, since the formulation proposed by the sub-committee (unlike conspiracy to defraud) would have required proof of reasonably well-defined factors such as false representation, wilful non-disclosure and economic loss. The

⁷⁴ Or, in the case of conspiracy, one fraudulent agreement; but the distinction is largely theoretical. If D practises ten dissimilar frauds on ten different victims, we do not believe that a court would treat this as a single course of deceptive conduct. Similarly if, albeit on a single occasion, D1 and D2 *agree* to practise ten such frauds, this would probably not be regarded as a single conspiracy.

⁷⁵ Hong Kong report, para 5.19.

⁷⁶ Hong Kong report, para 5.21.

element of “scheme” was not to be left to “do all the work”, any more than the element of dishonesty was: it was an *additional* element, and its inclusion would therefore have made the offence *narrower* in scope.

7.73 On the other hand we agree with the Commission that, since the concept of a “scheme” would have been an essential element of the offence, the vagueness of that concept would have made the substantive reach of the sub-committee’s proposal excessively *uncertain*. We also agree that it would be unwise to allow the substantive *scope* of an offence – the conduct that it does and does not render criminal – to be determined by procedural considerations. But this is not what we suggest. Rather, our suggestion is merely that conduct *which would in any event be criminal* (under one or more of the existing deception offences) might be capable of being charged in one count rather than several. Anyone who obtains (for example) property or services by deception would thereby be guilty of an offence; but it would be possible to charge a single criminal enterprise, involving two or more instances of the offence, as one continuing offence. As a matter of legislative technique we think it would be preferable to do this by treating the whole enterprise as constituting a single offence as a matter of substantive law (rather than by creating an *exception* to the rule against duplicity, so that a single count could charge what are *in law* separate offences). But this would not mean that any conduct was criminal which otherwise would not be. Our provisional view, therefore, is that it would not amount to “confusing procedural with substantive objectives in the formulation of [the] offence”.

7.74 **We invite views on whether, where a single fraudulent scheme involves the commission of two or more deception offences, the carrying out of that scheme should be regarded as a single offence, and it should therefore be possible to charge it in a single count of an indictment.**

7.75 If the response to this suggestion is favourable, we shall consider in a future consultation paper whether it might be adapted or extended for the purposes of theft. It is not our intention to make recommendations on this point without further consultation; but respondents’ initial views on it may prove helpful in assessing the present suggestion and (if it is acceptable) in formulating recommendations based upon it. **We invite preliminary views as to whether a single fraudulent scheme involving the commission of two or more thefts (or of theft as well as deception offences) should also be regarded as a single offence.**

PART VIII

THE BOUNDARIES OF DECEPTION

- 8.1 In this Part we examine the concept of deception and consider whether changes should be made to it, or to the related concept of achieving a specified objective *by* deception. We look first at the current understanding of deception in terms of the making of representations, and the application of this understanding to deception by conduct. We then turn to three areas close to or beyond the current boundary of the concept – the use of obtaining by deception to criminalise, primarily, the dishonest use of credit and cheque cards, by what we term “constructive deception”; the misuse or “deception” of machines; and non-disclosure.

REPRESENTATIONS AND DECEPTION BY CONDUCT

- 8.2 In 1903, Buckley J said that “to deceive is ... to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false”.¹ In 1968, the CLRC proposed the adoption of “deception” in preference to the older terminology of “false pretences”. The Committee thought it appropriate to shift the emphasis from the conduct of the defendant to the state of mind that it brought about in the person deceived. The change was also “more apt in relation to deception by conduct”.²
- 8.3 The practice in the courts, however, has not followed this lead. Deception offences are almost invariably charged in terms of one or more *representations* which the defendant is alleged to have made. This appears to be a continuation of the old practice. Before the Theft Act 1968, it was said that

the criminal offences of obtaining money, goods or credit by “false pretences” ... are established by much the same evidence as that which is required to substantiate an action for fraudulent misrepresentation. In both the one and the other, there is the same necessity of proving something which amounts in law to a representation.³

In the same work, a representation is defined as

a statement made by ... one person ... to, or with the intention that it shall come to the notice of, another person ..., which relates ... to a matter of fact. A “matter of fact” means either an existing fact or thing, or a past event.⁴

¹ *Re London and Globe Finance Corp* [1903] 1 Ch 728, 732.

² CLRC Eighth Report, para 87.

³ Spencer Bower, *The Law of Actionable Misrepresentation* (2nd ed 1927) p 36. In the 3rd edition (ed Sir Alexander Turner, 1974) at p 41, it is noted that this ceased to be true after *Dent* [1955] 2 QB 590; but the point of divergence related to statements of intention about future conduct, not the requirement for what “amounts in law” to a representation.

⁴ Sir Alexander Turner and Spencer Bower, *The Law of Actionable Misrepresentation* (3rd ed 1974) p 3 (article 1 of Spencer Bower’s “code”, which remained unchanged in the 3rd ed).

- 8.4 We are inclined to think that the continuing emphasis on representations is misplaced. A false belief is a psychological fact, and must be capable of being *formulated* as a statement of fact; but it need not be *induced* by the making, express or implied, of that or another statement. It can, as the statutory definition acknowledges, be induced by conduct as well as by words. Jacob wore goatskin on his hands and neck to fool his blind father Isaac into believing that he was in fact his elder brother Esau and thereby gaining his blessing.⁵ Jacob made a false representation in words, saying “I am Esau thy firstborn”, but Isaac did not believe him until he had felt his hairy hands. Jacob’s conduct in putting on the goatskin was what fooled his father. It *could* be analysed as a representation – “I am an hairy man”, or “I am your hairy son” or merely “I am Esau thy firstborn” again – but it is not a natural use of ordinary language to analyse it in this way, and there is no obvious reason why it should be necessary.⁶
- 8.5 An illustration of the lengths to which an emphasis on representations requires the law to go is provided by the representations that, in *Ray v Sempers*,⁷ the House of Lords found to have been made by a man ordering and eating a meal in a restaurant. In such a case, according to one member of the majority who considered Ray guilty of a deception offence, there is a representation by the diner “which is being made by conduct at every moment throughout the course of conduct” from the time he or she enters the restaurant.⁸ In our view, as a matter of ordinary English language usage, the diner does not *represent* anything by entering the restaurant and ordering a meal, but does deceive the waiter into thinking that the diner intends to pay for the meal ordered. The House of Lords emphasised that Ray acted as an ordinary customer. Ordering a meal in a restaurant, like hailing a taxi or taking a room in an hotel, is an everyday activity which is governed by informal rules understood by everyone involved. By engaging in that activity, the diner, taxi-traveller or hotel guest induces in the waiter, taxi-driver or clerk the belief that he or she intends to obey all of the rules of the activity, including paying for the service. Such activities are well understood by juries and lay magistrates. We provisionally consider that it would be clearer if, in such cases, juries were not asked, and justices did not feel obliged, to distil from these everyday activities precise and artificial representations. The question for them should simply be: did the defendant, by what he or she did, induce in the other a mistaken belief?
- 8.6 A further problem of the traditional approach is that it is far from clear how it sits with the division of responsibility between judge and jury in a trial on indictment. In theory, it is the duty of the judge to tell the jury what representations the

⁵ Genesis xxvii. It is perhaps surprising that Isaac’s blessing, obtained under a fundamental mistake as to the identity of the person blessed, remained valid.

⁶ Where the false belief is brought about not by conduct but merely by sense data from the material world, it is not even *possible* to find a representation. A mirage may induce in a traveller in a desert the false belief that there is water ahead; but it scarcely makes sense to suggest that the interplay of heat and haze which produces the mirage represents to the traveller “this is water”. Where it is a *person* who induces the belief, this fact makes it less obviously absurd to analyse the situation in terms of representations; but in our view it is not necessarily any more appropriate.

⁷ [1974] AC 370.

⁸ *Ibid.*, at 390E, *per* Lord Pearson.

defendant's conduct was *capable* of implying; but the task of determining whether or not the representation was in fact made is one for the jury. Thus, in cheque and credit card cases,⁹ the judge should tell the jury that they *may* find that a person who proffers a cheque impliedly represents that it is valid and will be paid; and it is for the jury to determine whether that representation was in fact made in the case before them.¹⁰ But what is the factual enquiry that the jury are supposed to conduct? It is not clear what evidence, over and above the simple fact of the transaction, the prosecution can adduce in order to convince the jury that this defendant did in fact impliedly represent what the judge has said the defendant's conduct was capable of representing.

- 8.7 It is arguable that, since the legislation does not use the word "representation", there is no need to amend it in order to discourage the inappropriate use of that word in indictments and directions to juries. But we suspect that practitioners and judges may sometimes use it inappropriately because it is commonly supposed to be inherent in the concept of deception; and that they might be less inclined to do this if the legislation were to make it clear that it is *not* inherent in that concept. **We provisionally conclude that deception should be understood as the inducing of a state of mind by words or conduct, with or without a representation; and we invite views as to whether the legislation should be amended accordingly.** Such an amendment might take the form of a new definition of "deception"; or it might be explicitly stated that no representation is required.

CONSTRUCTIVE DECEPTION

- 8.8 The law requires first that there be a deception, and secondly that the deception be a cause of the obtaining. The current state of the law, however, sometimes conflates the two stages. A person is regarded as having been deceived where he or she does not in fact *believe* something to be true, if that person would have acted differently had he or she known that it was not. In these circumstances, a person is *said* to be deceived, and that deception is said to be operative in causing the obtaining, where there is in fact no mental state corresponding to deception, and the person concerned may even deny that he or she was in fact deceived. It seems appropriate to call this "constructive deception".

Cheque, credit and debit cards

- 8.9 Constructive deception has principally arisen in connection with the obtaining of property or other benefits by means of a credit card or a cheque backed by a cheque card. It is hardly surprising that the criminal misuse of cheque cards or credit cards is not happily dealt with in the Theft Acts, as it is a comparatively modern problem. It was not until 1965 that the banks began issuing cheque cards; Barclaycard was launched in 1966 and Access in 1972. Even more modern are debit cards, introduced in 1987.¹¹ We refer to all of these as "payment cards".

⁹ See para 8.11 below.

¹⁰ *Metropolitan Police Commissioner v Charles* [1977] AC 177.

¹¹ They are now more popular than credit cards: *Daily Telegraph*, 16 February 1997.

- 8.10 The use of such cards reassures the trader that the bank will honour payment if the conditions on the card are satisfied. This will be so even if the customer is acting without the bank's authority because his or her account is overdrawn or a credit limit has been exceeded. The bank has made it unnecessary for the trader to enquire into the state of the customer's bank account, or his or her credit limit, by promising that payment will be made. However, the courts have proved reluctant in some cases to acknowledge what is likely to be the trader's real state of mind with regard to such a transaction.
- 8.11 In *Charles*¹² the defendant's account was overdrawn, without authority from the bank. Charles, knowing he was not entitled to do so, nevertheless obtained gaming chips at a gambling club by presenting a cheque and a cheque card. The card's conditions were met. The House of Lords (by a majority of three to two) found, using the language of implied representations, that, if Charles had paid by cheque alone, the key representation would have been that the existing facts were such that it was reasonably foreseeable that the cheque proffered would be honoured by the bank. When a cheque card was used, however, not only did that representation continue to be made (though the use of the card rendered it both true¹³ and unnecessary), but a further representation was also made that the drawer of the cheque was authorised to bind the bank to honour it; and in Charles' case this representation was untrue. This conclusion was reached despite evidence from the manager of the gambling club (to whom the cheques were payable) that no enquiries were made as to customers' creditworthiness. It was regarded as irrelevant unless the club *knew* that a customer had no funds or was acting without authority.
- 8.12 This decision, which has been described as "almost perverse" in the light of the evidence,¹⁴ was followed in *Lambie*.¹⁵ The defendant had exceeded her credit limit on her credit card and had failed to return the card at the bank's request. She bought goods with the card after the manager had checked that the card's conditions were met. The House of Lords decided that her conviction for obtaining a pecuniary advantage by deception should stand, despite the manager's robust insistence that she was indifferent to the state of Lambie's account: she could not have meant what she said. She had in fact been induced to accept the card by a representation similar to the one that was held to have been operative in *Charles*.
- 8.13 In neither case could it fairly be said, in our view, that the alleged victim *believed* (or even assumed) something to be true which was in fact false. The nature of payment cards is such that the fraudster has no need to instil such a belief. There can be a causal link between the fraudster's misuse of the card and his or her obtaining of the property (or other benefit) despite the absence of any real, operative deception. It may, however, be assumed that, had the trader known the

¹² [1977] AC 177.

¹³ The cheques were duly honoured. Indeed, it was the loss to the bank that was charged against Charles (in the form of the pecuniary advantage of an increase in borrowing by means of overdraft).

¹⁴ Smith on Theft, para 4-09.

¹⁵ [1982] AC 449.

truth in each case (namely that the user of the card was not authorised to use it), he or she would not have accepted it: to do so would have implicated him or her in the fraud, and thus disentitled him or her to payment. That state of mind – knowledge of the truth – would have broken the causal chain between the misuse of the card and the obtaining of the benefit. The effect of the House of Lords’ reasoning is that, even if the trader is indifferent to the state of the card user’s bank account or credit limit (and thus cannot properly be described as having been deceived), he or she can be *treated* as having been deceived if, had he or she happened to know that the account was overdrawn or the credit limit exceeded, he or she would not have accepted that form of payment. A statement about causation is thus used to attribute to the trader a state of mind which he or she does not in fact have.

- 8.14 This approach, which we call “constructive” deception, has the advantage that it is *capable* of rendering criminal a very prevalent abuse. Its disadvantage is that it does so by resorting to artificiality, which can cause practical problems. It is said to be difficult to persuade a jury to convict where the trader has given evidence that he or she was not concerned about the true state of affairs – an admission likely to be secured in a high proportion of real cases.
- 8.15 There are two facets to this problem. The first is that the jury may acquit “wrongly”, in the sense of not properly applying the law. It has traditionally been thought that juries are suspicious of constructive liability of any sort.¹⁶ Even if a jury try to apply the directions they are given, the artificiality of the legal analysis involved is likely to result in misunderstandings. Such problems are likely to be at their most acute in inchoate offences such as attempt or going equipped for “cheat” (as going equipped to obtain by deception is known).¹⁷
- 8.16 Secondly, the facts may be such that, under the law, the jury are *right* to acquit. The trader may say that it would have made no difference if he or she had known that the defendant was not authorised to use the card; or the jury might conclude that that is what the trader meant by saying that he or she did not care one way or the other. And they might be right to think so. If a customer says to a shop assistant “I’m overdrawn, so I had better use my cheque card just in case”, it would be a rare shop assistant who replies “Well, in that case I am afraid I cannot accept payment by cheque, even with a card”. We believe that deception should be understood as the inducing of a false belief – a psychological fact – rather than as something which by abstruse legal analysis can be *deemed* to have occurred.

Imposing liability on a third party

- 8.17 If deception were so understood, however, an offence based on deception would not catch the fraudulent use of payment cards. We therefore suggest that misuse of payment cards should form the subject matter of a new offence. Such an offence would properly identify the actual wrongdoing and the real victim, namely the

¹⁶ Commenting on “the fictional deception” found by the House of Lords in *Charles and Lambie*, Professor Sir John Smith noted that “juries prefer the truth to fiction, even fiction written by their Lordships”: “Reforming the Theft Acts – A Bracton Law Lecture” (1996) 28 Bracton LJ 27, 40.

¹⁷ Theft Act 1968, s 25(5).

bank (or other card provider).¹⁸ The bank gives the card-holder a tool which enables him or her to fix the bank with liability. The wrongdoing lies in the fraudulent misuse of this tool to the bank's detriment. The customer mentioned in the previous paragraph, who is honest about his or her overdraft, does the same wrong to the bank (if the card is accepted) as the customer who says nothing, or lies about the state of his or her account.

- 8.18 The essence of the suggested offence is that one person causes another to become indebted to a third, without any legal right to do so. A similar offence has been proposed by Professor Sir John Smith:

A person commits an offence if he intentionally causes a legal liability to pay money to be imposed on another, knowing that the other does not consent to his doing so and that he has no right to do so.¹⁹

The requirement that the defendant should have no "right" to impose liability on the other should, in our view, mean that his or her conduct must be actionable at the other's instance. Clearly the offence could not extend to cases where one person is legally free to impose liability on another.

- 8.19 An alternative approach would be to define the offence by specific reference to payment cards. But to do so would involve definitions which might quickly become out of date, as payment instruments develop under the impact of new technology and greater commercial sophistication. Focusing on the legal effect of what is done, rather than the commercial machinery by which it is done, would minimise the risk of technical points being taken as to the precise circumstances in which the rule applies. Our provisional preference, therefore, is for a broader offence of the kind proposed by Sir John Smith. We invite views as to whether such an offence would catch behaviour that ought not to be criminalised.

Consent procured by deception

- 8.20 The requirement that the victim should not consent to the imposition of the liability, like any requirement of non-consensual conduct, invites the question of what should count as consent for this purpose.²⁰ In particular, should the offence catch a person who uses *deception* to induce the victim to consent? In the context of payment cards this situation is perhaps unlikely to arise, but the offence we propose would be wide enough to apply in other contexts too. It is based on the idea that there is little or no difference in principle between depriving a person of his or her property and causing him or her to become indebted to a third party.

¹⁸ While it is possible to charge cheque card fraud (though probably not credit card fraud) as the obtaining of a pecuniary advantage from the bank, it is more common to charge the obtaining of the actual property or service: ie "...obtained from Oddbins a bottle of whisky by deception ..." rather than "obtained for himself a pecuniary advantage, namely increased borrowing by way of overdraft from the ... Bank".

¹⁹ (1996) 28 Bracton LJ 27, 40-41.

²⁰ See generally Criminal Law: Consent in the Criminal Law (1995) Consultation Paper No 139. We provisionally proposed that it should be an offence to do an act which would be an offence if done without another's consent, where that other's consent is obtained by deception: para 6.81.

- 8.21 This point can be illustrated by the case of a person who deceives another into transferring funds from the latter's bank account. Before *Preddy*²¹ demonstrated that this cannot amount to an offence of obtaining property in any event, it was thought that the fraudster was guilty of that offence only if the victim's account was in credit (or overdrawn within a legally binding overdraft facility) when the funds were transferred. If the account was overdrawn and the victim had no right to overdraw further, there was no property of which the victim could be deprived. But there is no difference in substance between obtaining funds from an account which is in credit and obtaining them from one which is overdrawn. The loss to the victim is effectively the same in either case.
- 8.22 For this reason we recommended in our money transfers report that liability for the new offence of obtaining a money transfer by deception should not depend on the state of the transferor's account. Section 15A of the 1968 Act now provides accordingly. The gap in the law exposed by *Preddy* would be more comprehensively filled by our proposal to extend the law so that it is an offence not only to *obtain* property by deception but also to deceive its owner into parting with it or destroying it.²² If this proposal were adopted, it might be unnecessary to retain special provision for the defendant whose deception causes another to part with funds in a bank account as distinct from any other property.
- 8.23 However, there is one respect in which the money transfers offence goes further than the offence of obtaining property would go, even if it were extended in the ways we have proposed. It is an offence to obtain a money transfer by deception *even if the account from which the funds are transferred is overdrawn*, and the transferor is therefore not deprived of property at all. Clearly we would not wish to reverse this rule; but the offence of obtaining property by deception is, by its nature, an inappropriate home for it. We could simply retain the money transfers offence, and let the extended offence of obtaining property by deception stand alongside it. This option would leave the money transfers offence almost (but not quite) redundant, and we are not attracted by it. But, if our proposed offence of imposing liability without authority extended to the case where authority is procured by deception, it would seem to cover this situation. The increase in the victim's overdraft is an additional liability to which the defendant causes the victim to become subject. The victim does consent to the defendant's doing so, but that consent is procured by deception.

The mental element

- 8.24 Sir John Smith's formulation of the offence requires a threefold mental element:
- (1) intention to impose the liability on the other;
 - (2) knowledge that the other does not consent to the imposition of the liability; and
 - (3) knowledge that, in those circumstances, the defendant has no right to impose it.

²¹ [1996] AC 815.

²² Para 7.7 above.

- 8.25 While we provisionally accept the second and third of these requirements, our provisional view is that the requirement of *intention* to impose liability is too strict. While there are some offences which require the bringing about of a particular consequence with the intention of bringing it about, in general it is sufficient that the defendant was aware of the risk of the specified consequence but nevertheless unreasonably went ahead with the conduct that brought it about. This state of mind is known as recklessness. We are not convinced that there is any reason why the offence we propose should be an exception to this general principle.
- 8.26 Moreover, a requirement of intention is likely to be misunderstood. The fraudulent user of a payment card does not care whether anyone else incurs liability for the debt, as long as he or she does not have to pay it; and it might therefore be thought that there is no *intention* to impose liability on another. The theoretical answer to this argument is that there is a difference between intention and purpose. To say that D intends V to become indebted to a third party does not mean that D *cares* whether V becomes indebted. A person can intend a consequence without desiring it to come about.²³ But this is a somewhat subtle distinction. Many non-lawyers would say that the fraudster does not intend to impose liability on the bank, only to get the property or services. We believe that it would be unwise to require proof of an element as to which fact-finders are likely in doubt, even when in law it clearly exists. We therefore provisionally conclude that it should not be necessary to prove that the defendant intended to impose liability on another, only that he or she was reckless whether this occurred.

Presumed consent

- 8.27 It is worth considering whether it is indeed right that *all* unauthorised use of payment cards should be criminal. The case which in our view should arguably *not* be criminalised is that in which, in the context of an ordinary, continuing banking relationship, a person knows that by making a purchase he or she will cause his or her bank account to become overdrawn without authority, but nevertheless goes ahead and uses a cheque card to make the purchase. Such a person is no doubt in breach of the terms of his or her contract with the bank, but in the context of a continuing relationship where it will be understood by both parties that the overdraft will be repaid in due course. Indeed, in such a case, one would not ordinarily expect the bank to take any action.

²³ The point is made clear by the definition of intention in cl 1 of the draft Bill annexed to our report *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218:

For the purposes of this Part a person acts –

- (a) “intentionally” with respect to a result when –
- (i) it is his purpose to cause it, or
 - (ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result ...

The credit card fraudster’s *purpose* is to obtain property or services; but he or she *intends* to cause the bank to become indebted to the trader, because only by creating that indebtedness can he or she get the thing desired.

- 8.28 Problems may, however, arise in excluding such a case without also excluding clear cases of true fraud. One could limit the offence to cases where the card was stolen or temporarily appropriated, and the individual had never had a right to use it. But that would probably exclude a person who applies for payment cards in order to run up unauthorised debts and then abscond. There would be an offence in such a case if the bank account or payment card were obtained by deception, but this will not necessarily be so. We think it would also be right to criminalise the *use* of the card.
- 8.29 The point could perhaps be met by including within the new offence a negative dishonesty element,²⁴ thus excluding a defendant whom the fact-finders consider not to be morally culpable. But it is in such cases that the *unreliability* of dishonesty, even as a negative element, is relevant. It *might* have the desired effect, but equally it might not. And it would provide those who *should* be convicted with a chance of acquittal – resulting in unnecessary trials where there would otherwise be a guilty plea, and unnecessarily prolonged trials where there was another, real, issue.
- 8.30 An at least partial alternative would be to include in the offence a defence analogous to that provided by section 2(1)(b) of the Theft Act 1968. A person would not commit the offence by imposing a liability on a third party without authority where he or she believes that the third party *would* have authorised the imposition of the liability if that party had known all the material circumstances. Thus if the defendant said in evidence “I believed that if I had telephoned my bank and explained the situation, they would have said I could make the purchase”, and the fact-finders thought this might be true, an acquittal would follow. Our provisional view is that this approach is right in principle, and would serve to exclude cases involving no real moral blame.
- 8.31 **We provisionally propose**
- (1) that a person should commit an offence if he or she intentionally or recklessly causes a legal liability to pay money to be imposed on another, knowing that the other does not consent to his or her doing so and that he or she has no right to do so; and**
 - (2) that the other should not be regarded as consenting to the imposition of the liability if his or her consent is procured by deception; but**
 - (3) that a person should not commit the offence if, at the time of causing the liability to be imposed, he or she believes that the other would have consented to his or her doing so if the other had known all the material circumstances.**
- 8.32 Our suggestion is that this new offence should *replace* liability for payment card fraud on the basis of constructive deception; but, even if constructive deception continued to be sufficient for the deception offences, we think that such cases could be more effectively prosecuted under the new offence. If the offence were

²⁴ See 3.12 – 3.17.

enacted against that background, the argument for confining it to the use of particular payment instruments (as against the imposition of liability by any means) might be stronger.

Constructive deception and going equipped to cheat

- 8.33 In *Doukas*,²⁵ the defendant was convicted of going equipped to cheat. The articles with which he was equipped were bottles of wine. The prosecution case was that Doukas, a waiter, intended to supply his own wine rather than that belonging to the hotel for which he worked, and keep the proceeds. The court held that the jury should ask, of the hypothetical customer to whom Doukas intended to supply his own wine, “why did you buy this wine; or, if you had been told the truth, would you or would you not have bought the commodity?”. The second question invites the application of the notion of constructive deception.²⁶ The court meant by this hypothetical customer an *ideal* customer, who as a matter of law is imbued with certain characteristics: he or she “must be reasonably honest as well as being reasonably intelligent”.
- 8.34 If our preferred interpretation of deception as a real, psychological fact were to be adopted, the starting point for the determination of such cases would be the question: did the defendant *intend* to bring about the specified consequence by deceiving someone? To answer that question, a jury would have to find, as a matter of fact, first what the defendant proposed to do; and second, whether that course of action involved actually deceiving a person and thereby securing the specified consequence. We see no need to posit an ideal, hypothetical customer in the way suggested by *Doukas*.
- 8.35 A feature this situation shares with that of payment cards is that the real harm may be done not to the person constructively deceived, but to a third party – in this case the defendant’s employer, who loses revenue. If, in the circumstances, such an activity gives rise to a constructive trust in favour of the employer, the employer enjoys a proprietary right to the moneys appropriated by the defendant, and the defendant can arguably be charged with theft.²⁷ If it does not, then it seems to us acceptable that the activity should not be criminal. As Bridge LJ said in *Rashid*,²⁸ rejecting an argument that in a similar case the focus should be the cheating or defrauding of the employer, such an approach “is to elevate what unquestionably is a dereliction of a servant’s contractual duty to his employer into a criminal offence.” It is admittedly a drawback of this approach that it makes criminal liability depend on fine and technical distinctions drawn by the civil law. But this seems to us to be inevitable: the law of theft exists to protect proprietary interests

²⁵ (1978) 66 Cr App R 228. The case was approved by the House of Lords in *Cooke* [1986] AC 909. See also *Corboz* [1984] Crim LR 629.

²⁶ See para 8.8 above.

²⁷ *A-G’s Reference (No 1 of 1985)* [1986] QB 491 appears to decide otherwise; but the reasoning was partly based on the view that there can be no constructive trust in such circumstances, a view rejected by the Privy Council in *A-G of Hong Kong v Reid* [1994] 1 AC 324. See Sir John Smith, “*Lister v Stubbs* and the Criminal Law” (1994) 110 LQR 180.

²⁸ [1977] 1 WLR 298, 301. Dicta in this case, that it was to be doubted whether a train steward deceived the passengers by selling them his own sandwiches rather than British Rail’s, were disapproved in *Doukas* [1978] 1 WLR 372.

recognised by the civil law. It cannot perform this function without taking account of the distinction between those cases where the civil law deems a proprietary interest to exist and those where it does not – however fine that distinction may be.

MISUSE (“DECEPTION”) OF MACHINES

- 8.36 It now appears to be settled law that a deceit can only be practised on a human mind, although there is little direct authority on the point.²⁹ “Deceiving” a machine in order to obtain *property* will normally found a charge of theft: for example, the law sees no distinction between putting a false coin in a vending machine and breaking into the machine to take its contents. However, there is no offence of stealing a *service* (or any other benefit other than property): in general, the dishonest obtaining of a service is criminal only where it is done by deception. If a person uses a false coin to operate a washing machine in a launderette, there is no obtaining of services by deception because no human being is deceived.³⁰
- 8.37 In certain particular contexts this has been regarded as a significant loophole in the law, and various attempts have been made to plug it with specific statutory sections. For example:
- (1) It is a summary offence to operate a parking meter otherwise than in the prescribed manner.³¹
 - (2) It is an offence to obtain a telecommunications service with intent to avoid paying for it.³²
 - (3) The Value Added Tax Act 1994, section 72(6), provides that, for the purposes of the offence under section 72(3) of using a false document with intent to deceive, an intent to deceive includes an intent “to secure that a machine will respond to [a false] document as if it were a true document”.
 - (4) In relation to forgery, which is defined in terms of inducing somebody to accept a false instrument as genuine, the Forgery and Counterfeiting Act 1981 provides in section 10(3) that “references to inducing somebody to accept a false instrument as genuine ... include references to inducing a machine to respond to the instrument ... as if it were a genuine instrument”.
- 8.38 In 1993 we conducted consultations with a range of business organisations including the British Bankers’ Association, British Telecom, the Association of British Insurers and the Credit Industry Fraud Avoidance System. The purpose of the consultation was to ascertain whether there currently existed, or were likely to

²⁹ No express support for this view is to be found in s 15(4) of the Theft Act 1968. But in *Clayman*, *The Times* 1 July 1972 a trial judge ruled that it was not deception to jam a parking-meter with a ring from a beer can.

³⁰ He or she might be guilty of abstracting electricity contrary to s 13 of the Theft Act 1968, or perhaps of making off without payment, contrary to s 3 of the 1978 Act.

³¹ Road Traffic Regulation Act 1984, s 35A(2), inserted by the Parking Act 1989, s 2.

³² Telecommunications Act 1984, s 42.

be developed, any systems involving the supply of false information to a machine which would warrant a new offence. No such procedure was identified.

The internet

- 8.39 Had that been the situation today, we would have been minded to conclude that there was no sufficient reason to create an offence of dishonestly obtaining a service from a machine. However, it now appears to us (albeit without the benefit of a separate consultation exercise similar to that conducted six years ago) that technology and its uses have developed faster than could have been anticipated, and in unforeseen ways.
- 8.40 The centrally important development since 1993 has been the phenomenal growth and increased sophistication of the internet. The commercial use of the internet, known as “e-commerce”, is increasing exponentially. The then Secretary of State for Trade and Industry said in November 1998 that “In the next century the internet will become the universal medium of trading and commerce”.³³ In the same month, the Vice President of the USA said that there were currently 27 million purchases made every day on the internet, and that the value of e-commerce could reach \$300 million in a few years’ time.³⁴ We are aware that the technological developments we discuss below have applications in other contexts too. But we emphasise the internet because of the enormous economic impact that it is likely to have in the foreseeable future.
- 8.41 The internet is important in performing two distinct (although in practice closely related) functions. The first is as a market-place and a mode of communication; the second is as a delivery mechanism for services. There is a significant legislative effort to ensure that the legal system as a whole facilitates the development of both functions. An Electronic Commerce Bill is expected to be introduced during the current (1998–99) session of Parliament, and the Commission of the European Union has presented a draft directive designed to create a coherent Europe-wide legal framework, applying to all “information society services”.³⁵

The internet as market-place

- 8.42 In volume terms, it is our understanding that the greater bulk of e-commerce currently involves business-to-business transactions, where there will often be an underlying paper contract setting out the way in which the internet will be used. In such circumstances, the internet is really acting as no more than a sophisticated communications system, and any fraudulent use is likely to involve the commission of existing offences. Where retail sales are concerned, however, the issues relating

³³ Speaking before the Trade and Industry Select Committee on 4 November 1998.

³⁴ *The Times* Interface supplement, 2 December 1998.

³⁵ Articles 12–14 of the draft Electronic Signatures Directive (May 1998, available at <http://www.dti.gov.uk/cii/ecomdirective/index.htm>) grant immunity to the providers of technical resources for the internet, such that a provider merely relaying information, temporarily storing information to accelerate transmission, or innocently hosting websites, newsgroups etc, cannot be prosecuted. Article 15 requires that there should be no general duty on a service provider to monitor content originating with a third party using the system.

to the delivery of services by machine (that is, computer) can arise. Software is available which allows a customer to key in his or her credit card number. The computer checks to see whether the credit card is listed as lost or stolen, and, if it is not, issues the necessary instructions for the delivery of the purchase and the debiting of the credit card.

8.43 If that which is obtained by means of one of these systems is property, fraudulent use of the credit card can be charged as theft. However, if it is a *service* that is obtained (such as, for instance, a theatre ticket),³⁶ under the current law no offence would be committed, because no human mind would be deceived by the implied representation that the user of the credit card was authorised to use it.³⁷ Such conduct would, however, be covered by our proposed new offence of unlawfully imposing a liability on another person, which does not require deception.³⁸ Just as in the case where a human being accepts the card, the real mischief of such conduct is the cheating of the credit card company;³⁹ and that is the target of our new offence.

8.44 As noted above, similar mechanisms exist outside the context of the internet. It is now commonplace to buy theatre and cinema tickets on an automated system, using credit card details over the telephone. The computer at the booking office checks whether the seats required are available and, if they are, takes the credit card details (using touch-tone telephony) without human intervention. At the end of the day the price of the tickets is charged to the customer's credit card account. At the moment, this part of the operation may involve a human operator, but it will no doubt soon be possible for the transaction to be processed without any human involvement at all. Fraudulent use of such a system would similarly fall under our proposed offence of imposing liability on a third party. Indeed, so long as tickets continue to exist physically, it may also amount to theft,⁴⁰ and certainly would do so if (as we propose)⁴¹ the requirement of intention permanently to deprive were abolished.

³⁶ What is sold is the right to view the performance. It might be possible to charge the theft of the ticket as a physical object; but this would be highly artificial, and has been said by the Court of Appeal in another context to be undesirable: *Graham* (1997) 1 Cr App R 302.

³⁷ It is not clear whether the viewing of images over the internet would amount to the obtaining of property or the provision of a service. A computer file which stores an image has been held to be a "copy of a photograph" for the purposes of the law of obscenity (*Fellows and Arnold* [1997] 2 All ER 548), and as a matter of fact all images viewed whilst browsing the internet are saved on the user's hard disk, albeit temporarily. However, in downloading the file, the "original" on the provider's server is copied rather than taken. This tends to suggest that the user is availing himself or herself of a service.

³⁸ But deception would be an alternative to the absence of consent: see paras 8.20 – 8.23 above.

³⁹ See para 8.7 above.

⁴⁰ On the basis described by Professor Sir John Smith in "Stealing Tickets" [1998] Crim LR 723.

⁴¹ See paras 7.29 – 7.30 above.

E-MONEY

- 8.45 However, transactions on the internet will not necessarily take place using traditional payment methods. "E-money" is the term given to systems which store value on an electronic device in the customer's possession. The storage mechanism may be an e-money card or an ordinary personal computer. The former is a plastic card (like the Mondex card which is being tested in Britain by National Westminster Bank) into which is embedded a microprocessor chip which can store information. The issuer of the e-money card stores a record of pre-paid value in the plastic card itself, which the customer spends at retailers, or transfers to the e-money cards of others.
- 8.46 The Mondex card is specifically designed to be as like cash as possible, and is primarily designed to be used in the physical economy rather than on the internet. The same objective, of getting as close as possible to real money, lies behind PC-based e-money. But e-money is not *actually* money. It should probably be analysed as a token representing a chose in action against the issuer. Certainly, the company which issues Mondex cards is bound to redeem the tokens stored on a card for sterling on presentation. If this analysis is right, the use of e-money would not be significantly different from payment with a credit or debit card, in that a person using it fraudulently would be imposing a liability on the issuer.
- 8.47 However, both forms of e-money are *intended* by their promoters to become assimilated to money, and that is not an unrealistic hope: for instance, the monetary policy implications of considering e-money as real money have been considered by central banks.⁴² It may indeed be that for the internet to achieve its potential, at least in the supply of small value items, e-money will at some time in the future have to be seen and accepted as truly in the nature of money. If it were really money, its use would not impose a liability on a third party. But, if we are serious about it being real money, we would not expect its use to be an offence, any more than the use of stolen real money is at present.⁴³
- 8.48 It appears to us, therefore, that, considered purely as a market-place, any fraudulent use of the internet will be covered by offences which cover fraudulent conduct in the more traditional physical market-place – *provided* that the unauthorised imposition of liability is made an offence as we have proposed.

The internet as an agency for the provision of services

- 8.49 However, a service may not only be *bought* over the internet but also *delivered* via the same medium. The internet can be used for the provision of legal or financial advice, or the distribution of electronic magazines or other publications. Once an annual subscription is paid, access to the service bought may be regulated by the provision to the user of a password or personal identification number. If the fraud

⁴² See, eg, The Bank for International Settlements: Implications for Central Banks of the Development of Electronic Money (1996).

⁴³ If and when it appears that e-money is to become fully assimilated to money, it would be necessary to ensure that those offences which relate to the use of either stolen money or money which is the proceeds of criminal activity (eg money laundering offences) include the necessary references to e-money.

consists of the fraudulent use of such a form of access after the initial, legitimate purchase of the service by an innocent party, no offence is committed.

- 8.50 A similar problem could arise outside the internet. Employees or members of a club could, for instance, be authorised to use personal identification numbers, or magnetic (“smart”) cards, to gain automatic access to services. In France it is already possible to book hotel accommodation by credit card through an automated system. It is possible to envisage a company paying an annual fee to such a hotel chain and then providing its employees with an access card, rather than a payment card, to use the service. The same problem would arise as on the internet. The problem is likely to be more acute on the internet, however, because its depersonalised and anonymous nature will make detection and prevention harder.

Plugging the gap

- 8.51 Consideration of the best approach to criminalising such conduct raises some fundamental questions about the structure of the law of dishonesty. As *Archbold*⁴⁴ points out, “The lay view [is] that theft is taking without permission, and obtaining property by deception is tricking an owner into parting with possession.” Since *Gomez*⁴⁵ this may now be *only* the lay view, but it is also the historical foundation of the distinction in law between theft and deception (or false pretences). Because the paradigm of theft is taking without permission, originally the only things that could be stolen were those that could be carried away (though after 1968 this was extended to intangible property). Theft has not been defined to include the “taking” of services, because until recently this possibility has not been a significant one. By contrast, the obtaining of services by *deception* clearly *is* covered, at least since the 1978 Act, because it clearly *is* possible to trick the person who has the right to bestow a service into bestowing it. The effect of the technical innovations of recent years, and particularly the development of the internet, has been to effect a fundamental change to this *practical* justification for the distinction between the two types of offence.
- 8.52 Of course, it could be argued that the gap in the law we have identified above is comparatively narrow. It amounts to misusing a machine to gain access to a service to which the person gaining the access has no legal right. It is therefore tempting to fit the plug to the gap, by narrowly criminalising such behaviour as a specific new offence. There are two reasons for not adopting this course. In the first place, “misusing” should be read to include not only the inputting of false data (and thus “deceiving” the machine), but also straightforward physical or other manipulation of the machine to obtain the desired result. A person who dishonestly extracts an item from a vending machine is guilty of theft, and it makes no difference whether he or she does so by “deceiving” the machine (for example, with a foreign coin) or by taking a screwdriver to it. It cannot be right that a person who dishonestly obtains (for example) a free game in an amusement arcade should be guilty of an offence if he or she does so by inputting false data, but not by wielding the screwdriver.

⁴⁴ Para 21-179.

⁴⁵ [1993] AC 442; see para 2.4 above.

- 8.53 In the second place, it would be illogical to protect those services access to which is guarded by a machine, but not those protected in other ways – such as the often cited (albeit not intrinsically significant) example of the person who gains access to a football match without payment by climbing over the fence.
- 8.54 If the law were extended to catch these kinds of conduct, it would effectively criminalise the “taking” of services – and that, in the terms of the distinction drawn above,⁴⁶ is clearly a *theft-like* offence. It could either stand alone or be added to the definition of theft itself. The definition of theft is a question to which we intend to return in another consultation paper; in particular, the best way to deal with what is now the concept of “appropriation” will be a key issue. For present purposes it is sufficient to suggest that extending the law of theft would be one way, and in our provisional view the most principled way, of dealing with the problem. For these purposes, the person who, in respect of a service, is in a position analogous to the owner of property in theft is the person who has the legal right to bestow (or decline to bestow) the service on a consumer – the “service controller”. The equivalent of the defendant’s appropriation of property would be his or her act in making use of the service without permission – that is, without fulfilling one or more conditions as to payment which the service controller requires to be fulfilled before consenting to bestow the service.
- 8.55 The other option is to criminalise the misuse of a machine as part of the law of deception. This would involve *deeming* the misuse of the machine to be something that it is not, namely the deception of a mind. There are drawbacks to this option. First, we have already indicated our dissatisfaction with constructive deception in one area of the law of deception.⁴⁷ The fiction that an inanimate object has a mental state is at least as far removed from reality, and open to similar objections.
- 8.56 Secondly, it is far from clear how this fiction could be accomplished. It would not be possible merely to state that “deception” *includes* deception of a machine, because there is no such thing. We might say that “deception” includes *giving false information* to a machine. But this would fit better into a law of false pretences than a law of deception. As we have stated above,⁴⁸ we are of the view that deception should be understood, as the CLRC intended, as a move away from an emphasis on the defendant’s false *representation* to the false *belief* that he or she implants in the victim’s mind. It would be unfortunate if the only situation in which a representation did have to be proved were where it is alleged that a machine was “deceived”. It would no doubt be necessary to make provision for implied representations as well as express ones. We have discussed the problems thrown up by this way of thinking at present;⁴⁹ how much more room for argument there would be if the thing “deceived” were a machine. An illustration is provided by the British Computer Society, who asked, in response to an earlier suggestion of ours to this effect,⁵⁰ whether a person “deceives” a pinball machine by tilting it, on the

⁴⁶ See para 8.51 above.

⁴⁷ See para 8.16 above.

⁴⁸ See para 8.7 above.

⁴⁹ See paras 8.4 – 8.6 above.

⁵⁰ Working Paper No 104, para 10.4.

basis that he or she implicitly represents to the machine that the horizontal plane is somewhere other than where it is.

8.57 Our provisional conclusion is that the misuse of a machine to obtain a service should be criminal; but that it would be wrong to think of the “deception” of a machine as something which really *is* deception, and which the present law perversely refuses to recognise as such. In our view it is not deception; and it is in general likely to lead to distortions in the law, and ultimately to injustice, to deem a thing to be another thing which it is not.⁵¹

8.58 **We provisionally conclude**

(1) that it should be criminal to obtain a service without the permission of the person providing it, albeit without the deception of a human mind; but

(2) that this change should be effected by extending the offence of theft or creating a separate theft-like offence, rather than by extending the concept of deception. We therefore make no proposal on this issue, but will return to it when we review the law of theft.

NON-DISCLOSURE

8.59 In Scotland, a common law fraud may be committed by silence where a person has a contractual or statutory duty to disclose the truth and does not do so, but not otherwise.⁵² Both the Canadian Law Reform Commission and the New Zealand Crimes Bill Consultative Committee have made recommendations for restricting offences relying on dishonesty to deception.⁵³ Both of these recommendations would involve treating non-disclosure as a form of deception.⁵⁴

8.60 It is not clear whether non-disclosure can amount to deception in English law. The CLRC considered the question but decided that their Theft Bill should not attempt to answer it, considering that their proposed definition of deception (now section 15(4) of the Theft Act 1968) provided sufficient guidance.⁵⁵ The position is confused because it is often debatable whether a particular case should be analysed as pure non-disclosure or as positive deception by conduct. In *Firth*,⁵⁶ a doctor was convicted of evading liability by deception by failing to inform a

⁵¹ Clause 2 of the draft Bill attached to our report *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) Law Com No 245 defines a “statement” as including a representation intended to cause a machine to operate on the basis that the matter stated is as stated; but that is a provision designed for a very different purpose, viz to apply the hearsay rule to evidence of the supply of information in such circumstances that there is a likelihood of fabrication.

⁵² McCall, Smith and Seddon, *Scots Criminal Law* (1992) p 244.

⁵³ In the former case, a general dishonesty offence would become a general deception offence; in the latter, a statutory conspiracy to defraud relying on deception or dishonesty would be limited to deception.

⁵⁴ See paras 4.11 – 4.12 above.

⁵⁵ CLRC Eighth report, para 101(iv).

⁵⁶ (1990) 91 Cr App R 217.

hospital that certain patients he had referred to it were private rather than NHS patients. As a result the NHS did not send him or them bills. The Court of Appeal said that he could be convicted if it was incumbent upon him to provide the information, and he dishonestly refrained from doing so. It presumably became “incumbent” upon him to provide the information as a result of a term, express or implied, in either his contract of employment with the NHS or the contract under which the NHS provided his private patients with services. This implies that non-disclosure can amount to deception whenever the civil law imposes a duty to disclose; but *Archbold* argues that the decision does not go this far.⁵⁷ Arguably there was a positive deception by conduct, consisting in Firth’s act of referring the patients *plus* his silence.⁵⁸

8.61 It seems uncontroversial to conclude that liability for deception should not be extended to *mere* silence. This might extend criminal liability to anyone who makes a good bargain through superior knowledge. It would include a large swathe of what most people would consider legitimate business activity. Most importantly, it would criminalise a form of economic activity which involves no civil wrong.

8.62 More open to argument is the proposition that non-disclosure should amount to deception *where there is a legal duty to disclose*. On this question, our recent work on corruption is illuminating. In our consultation paper,⁵⁹ we analysed corruption in terms of a fundamental mischief (the breach of duty by an “agent”,⁶⁰ which may be induced by a bribe) on the one hand and the mischief of temptation (the temptation that the person offering the bribe puts in the way of the agent) on the other.⁶¹ We went on to suggest that a radical approach to law reform would involve directly criminalising the fundamental mischief, the breach of duty itself. One advantage of that approach, we said, was that it would “extend criminal liability to include those who breach duty of their own volition ... and without the intervention of an outside party”.⁶² A person who was under a fiduciary duty to make a disclosure, and omitted to do so, would fall into this category of “agents” failing in their duty. What we are considering here is the further case in which such a breach of duty results in the securing of a consequence which it is an offence to secure by deception.

8.63 Our provisional conclusion in the consultation paper was that

criminalising *all* such breaches of duty would be, in our view, unduly draconian, and criminalising *some* would mean devising a definition of what would amount to a criminal breach; such a definition would inevitably be elusive and controversial.

⁵⁷ *Archbold*, para 21-348.

⁵⁸ *Arlidge and Parry on Fraud* (2nd ed 1996) para 4-074.

⁵⁹ *Legislating the Criminal Code: Corruption* (1997) Consultation Paper No 145.

⁶⁰ A broad concept, which would probably include all cases in which a duty of the sort now under consideration was owed.

⁶¹ Paras 1.12 – 1.16.

⁶² Para 5.2.

8.64 These appear to us to be valid objections. Moreover, a number of weighty organisations who responded to the consultation paper pointed out that there were grave difficulties in relying on the concept of breach of duty, even in relation to the mischief of temptation. We quoted two responses in our report. The Securities and Investments Board said

Many commercial and public duties are unspecified and the introduction of these words is liable, in certain cases, to lead to protracted legal argument concerning whether a duty is owed and, if so, what constitutes a breach – matters which, as far as commercial relationships are concerned, are primarily the province of the civil law.

The Bar Council and the Criminal Bar Association considered that our reliance on breach of duty would create a “major problem”:

In discharging their duty an agent will often have to consider a vast amount of material which may be of a highly technical nature, after which there may be a band of discretion within which two honest agents might arrive at different decisions. If the Crown are obliged to prove a breach of duty ... , a jury would have to re-visit all the considered material and second guess what may be highly complicated decisions.⁶³

8.65 These objections seem equally valid where the duty in question is a duty of disclosure. For these reasons, **we provisionally conclude that non-disclosure alone should not count as deception, whether or not there is a legal duty to disclose.**

⁶³ Legislating the Criminal Code: Corruption (1998) Law Com No 248, paras 5.5 – 5.6.

PART IX

THE FUTURE OF THE EXISTING DISHONESTY OFFENCES

- 9.1 Our central reason for rejecting the option of a general fraud offence based on dishonesty is that it is wrong in principle to rely on *Ghosh* dishonesty as a positive element of offences; and it is in the nature of a general dishonesty offence that it must do this.
- 9.2 But *Ghosh* dishonesty also acts as a positive element in the existing offences of theft, conspiracy to defraud, fraudulent trading and cheating the revenue. We intend to review the law of theft in a future consultation document, and in that context will reconsider the proper role of dishonesty within it. However, the implication of our conclusions in this paper is clearly that these existing offences should either be amended so as to place less reliance on the concept of dishonesty, or else abolished. Thus there would be a case for amending theft so that it requires prima facie wrongful conduct (*unauthorised* assumption of *all* the rights of an owner),¹ abolishing conspiracy to defraud, and restoring fraudulent trading to its former role as an insolvency offence. (The arguments may be rather more complex in the case of cheating the revenue.) Firm conclusions on these offences must await our full consideration of theft and other offences of dishonesty.
- 9.3 Nevertheless, at this stage **we invite views as to whether the existing offences of theft, conspiracy to defraud, fraudulent trading and cheating the revenue have any features which render inapplicable our criticisms of offences which rely heavily on the concept of dishonesty.**

¹ Ie reversing *Gomez* [1993] AC 442, *Lawrence* [1972] AC 626, and the surviving part of *Morris* [1984] AC 320. See para 2.4 below.

PART X

SUMMARY OF PROVISIONAL PROPOSALS, CONCLUSIONS AND CONSULTATION ISSUES

In this Part we summarise our provisional proposals and conclusions, and other issues on which we seek respondents' views. More generally, **we invite comments on *any* of the matters contained in, or issues raised by, this paper, and any other suggestions that consultees may wish to put forward. For the purpose of analysing the responses it would be very helpful if, as far as possible, they could refer to the numbering of the paragraphs in this summary.**

A GENERAL DISHONESTY OFFENCE

1. We provisionally conclude that it is undesirable in principle that conduct which is otherwise unobjectionable should be rendered criminal merely because fact-finders are willing to characterise it as "dishonest".

(paragraph 5.32)

2. We provisionally conclude that, in relation to a Bill creating a general dishonesty offence, a Home Secretary could not safely be advised to make a statement of compatibility with the rights under the European Convention on Human Rights incorporated into English law by the Human Rights Act 1998.

(paragraph 5.52)

3. We provisionally reject the option of creating a general dishonesty offence.

(paragraph 5.53)

THE LAW OF DECEPTION

A general deception offence

4. We provisionally reject the option of creating a general deception offence, because such an offence would extend the law too far, and in too indeterminate a way, to be justifiable in principle. Such gaps as there are in the coverage of the existing deception offences should be closed by specific extensions of the existing offences.

(paragraph 6.30)

Obtaining property by deception

5. We provisionally propose that, for the purposes of the offence of obtaining property by deception, it should be sufficient that the person to whom the property belongs is deprived of it by deception, whether or not anyone else obtains

it. This would overcome any problem similar to those identified in *Preddy*¹ which might occur. (paragraph 7.7)

6. We invite views on whether the requirement of intention permanently to deprive in that offence should be
 - (1) retained;
 - (2) replaced with a requirement of intention to cause significant practical detriment to the person to whom the property belongs;
 - (3) abolished, subject to exceptions for specific circumstances (and if so, what circumstances); or
 - (4) abolished altogether.

Of these options, we provisionally propose the last. We invite views in particular on the desirability of the greater reliance on prosecutorial discretion which this proposal would involve.

(paragraphs 7.29 – 7.30)

Obtaining services by deception

7. We provisionally propose that, for the purposes of the offence of obtaining services by deception, the definition of “services” should be extended to include
 - (1) a benefit conferred with no understanding that it has been or will be paid for, provided that, but for the deception, it would not have been conferred without such an understanding; and
 - (2) any benefit conferred with a view to gain.

(paragraph 7.34)

Causing a consequence *by* deception

8. We invite views on whether much difficulty arises in practice from the requirement in the deception offences that the specified result be brought about *by* deception; and, if so, we invite suggestions as to how that requirement might usefully be modified.

(paragraph 7.38)

Dishonesty

9. We provisionally consider that the use of deception to secure the consequences specified in the existing offences is of itself generally wrongful; and that the element of dishonesty in those offences creates undue uncertainty and inconsistency, invites the introduction of evidence of negligible probative value,

¹ [1996] AC 815.

and allows those who should be found guilty to go free (or at least makes it harder to convict them). We accordingly provisionally propose

- (1) that the deception offences should cease to require proof of dishonesty as a separate element;

(paragraph 7.53)

- (2) but that it should be a defence to any of those offences that the defendant secures the requisite consequence in the belief that he or she is legally entitled to do so, whether by virtue of the deception or otherwise.

(paragraph 7.59)

Effective prosecution

10. We invite views on whether, where a single fraudulent scheme involves the commission of two or more deception offences, the carrying out of that scheme should be regarded as a single offence, and it should therefore be possible to charge it in a single count of an indictment.
11. We invite preliminary views as to whether a single fraudulent scheme involving the commission of two or more thefts (or of theft as well as deception offences) should also be regarded as a single offence.

(paragraphs 7.74 – 7.75)

Representations and deception by conduct

12. We provisionally conclude that deception should be understood as the inducing of a state of mind by words or conduct, with or without a representation; and we invite views as to whether the legislation should be amended accordingly.

(paragraph 8.7)

Imposing liability on another

13. The current law of deception is, we provisionally consider, ill suited to charging the fraudulent use of credit, debit and cheque cards (or any similar instrument which may be developed), and its use to do so distorts the law in unfortunate ways. We therefore provisionally propose
 - (1) that a person should commit an offence if he or she intentionally or recklessly causes a legal liability to pay money to be imposed on another, knowing that the other does not consent to his or her doing so and that he or she has no right to do so; and
 - (2) that the other should not be regarded as consenting to the imposition of the liability if his or her consent is procured by deception; but

- (3) that a person should not commit the offence if, at the time of causing the liability to be imposed, he or she believes that the other would have consented to his or her doing so if the other had known all the material circumstances.

(paragraph 8.31)

Obtaining services without deception

14. As a result of technological change, particularly the development of the internet, it is becoming possible to fraudulently obtain services of significant value without deceiving a human mind. Such conduct is not currently criminal. We therefore provisionally conclude
 - (1) that it should be criminal to obtain a service without the permission of the person providing it, albeit without the deception of a human mind; but
 - (2) that this change should be effected by extending the offence of theft or creating a separate theft-like offence, rather than by extending the concept of deception.

We therefore make no proposal on this issue, but will return to it when we review the law of theft.

(paragraph 8.58)

Non-disclosure

15. We provisionally conclude that non-disclosure alone should not count as deception, whether or not there is a legal duty to disclose.

(paragraph 8.65)

THE FUTURE OF THE EXISTING DISHONESTY OFFENCES

16. We invite views as to whether the existing offences of theft, conspiracy to defraud, fraudulent trading and cheating the revenue have any features which render inapplicable our criticisms of offences which rely heavily on the concept of dishonesty.

(paragraph 9.3)

APPENDIX A

EXTRACTS FROM THE EIGHTH REPORT OF THE CRIMINAL LAW REVISION COMMITTEE

(39)The word “dishonestly” in the definition in clause 1(1) is very important, as dishonesty is a vital element in the offence. The word replaces the requirement in 1916 s. 1(1) that the offender should take the property “fraudulently and without a claim of right made in good faith”. “Dishonestly” seems to us a better word than “fraudulently”. The question “Was this dishonest?” is easier for a jury to answer than the question “Was this fraudulent?”. “Dishonesty” is something which laymen can easily recognise when they see it, whereas “fraud” may seem to involve technicalities which have to be explained by a lawyer. The word “dishonestly” could probably stand without a definition, and some members of the committee would have preferred not to define it. But we decided to include the partial definitions in clause 2 in order to preserve specifically two rules of the present law. The first is the rule mentioned above that a “claim of right made in good faith” is inconsistent with theft; this rule is preserved in different language in paragraph (a) of clause 2(1). The second is the rule in 1916 s. 1(2)(d) that a finder of property cannot be guilty of stealing it unless he “believes that the owner can be discovered by taking reasonable steps”; this rule is reproduced in slightly different language in paragraph (b) of clause 2(1).

Criminal deception (clause 12)

(86)The offence of criminal deception under clause 12 corresponds to a number of existing offences concerned with obtaining something by false pretences or other deception or with practising deception for this purpose. Though there are certain defects in the present law, there is only one serious gap - that a false pretence as to intention does not count for the purpose of the offence of obtaining by false pretences. Apart from filling this gap the alternations made by clause 12 are intended mostly to simplify the law and remove certain doubts. But subsection (3) creates a general offence of practising deception with a view of gain which will supersede a number of miscellaneous offences.

(87)The principal offence under the present law is that of obtaining by false pretences contrary to 1916 s. 32(1). By that provision

“Every person who by any false pretence ... with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person”

is guilty of a misdemeanour and liable to five years’ imprisonment. The corresponding offence under the Bill is in clause 12(1). It will be committed by

“A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it ...”

The maximum penalty will be ten years' imprisonment. Apart from simplifying the language the clause does not differ greatly from the present provision; but important changes are made by means of the definition (in subsection (4)) of "deception", which replaces "false pretence" in s.32 (1). The latter expression is not defined in the 1916 Act, but the courts have given it a more restricted meaning than that which clause 12(4) of the Bill gives to "deception". In particular, they have construed it as referring only to a pretence about an existing fact and not as extending to a pretence about a future happening or even about an intention as to a future happening. The substitution of "deception" for "false pretence" is chiefly a matter of language. The word "deception" seems to us (as to the framers of the American Law Institute's Model Penal Code) to have the advantage of directing attention to the effect that the offender deliberately produced on the mind of the person deceived, whereas "false pretence" makes one think of what exactly the offender did in order to deceive. "Deception" seems also more apt in relation to deception by conduct.

(96) The other offence of deception included in clause 12 is the general offence in subsection (3). This offence will be committed by a person who

"dishonestly, with a view to gain for himself or another, by any deception induces a person to do or refrain from doing any act".

The maximum punishment will be two years' imprisonment. The general offence does not correspond to any particular offence under the present law. But it will cover a number of cases of dishonest deception which in our opinion ought to be made criminal offences and which are not or may not be covered by the present law. It will also cover a number of statutory offences of deception for the purpose of procuring something to be done under the Act in question. The purpose of creating the offence is to provide for relatively minor cases not falling within the main offence of obtaining property by deception under clause 12(1), within obtaining credit by deception under clause 12(2) or within procuring by deception the execution of a valuable security under clause 16(2) (which last offence is referred to in paragraph 107). Examples of the cases which will be covered, *provided that there is dishonesty*, are given below.

- (i) Inducing a person to release the offender from payment of a debt or to give him a rebate or allowance. Here the offender will not obtain property.
- (ii) Obtaining employment or some other contract or opportunity to get money or money's worth. There is an area of uncertainty in the present law whether a person who by false pretences obtain employment or an opportunity to get money or other property (for example, by being allowed to bet on credit or by getting an unfair handicap in a race) is guilty of obtaining the resulting profit by false pretences. Possibly the obtaining is too remote from the false pretence and the money or other property is to be regarded as obtained by the work, or by winning the bet or race, and not by the false pretence. Under clause 12(3) the deceiver will be guilty of inducing the person deceived to give him the employment or the other contract or opportunity.
- (iii) Various minor cases such as obtaining the loan of an article or obtaining a service, without property, where no question of credit arises.

(97) The scheme of clause 12 was the subject of substantial difference of opinion in the committee. The general offence under clause 12(3) represents a compromise between two radically different proposals put forward for dealing with criminal deception.

- (i) The first proposal was to create a general offence of criminal deception which would cover all or nearly all the kinds of deception which should be punishable and would carry the much higher maximum penalty of seven years' imprisonment. The offence would be defined as in clause 12(3) or a variant (for example, by making it apply to a person who "dishonestly, with a view to gain for himself or another, uses any deception" or "dishonestly, with a view to gain for himself or another, induces a person to act to the detriment of himself or another"). The essence of the offence would be dishonestly using deception for the purpose of gain. On this scheme there would be no separate offence of obtaining credit by deception under clause 12(2) (see the end of paragraph 95) or of procuring by deception the execution of a valuable security under clause 16(2) (see paragraph 107), because these offences would fall under the general offence in clause 12(3) and the proposed maximum penalty would be high enough for them. The offence of obtaining property by deception under clause 12(1) could be kept separate, because it is a specially important and serious offence, though it could be allowed to fall under the general offence if a maximum penalty were selected which was thought appropriate for both.
- (ii) The second proposal was to create only the specific offences of obtaining property by deception under clause 12(1), obtaining credit by deception under clause 12(2) and procuring by deception the execution of a valuable security under clause 16(2) and not to create any general offence on the lines of clause 12(3) at all.

(98) The arguments put forward for creating a general offence of criminal deception with high maximum penalty as mentioned in paragraph 97(i) were these.

- (i) It is right in principle that the dishonest use of deception for the purpose of gain as described in clause 12(3) should form the essence of the offence of criminal deception. What particular kind of gain the offender may aim at getting for himself or somebody else at the expense of his victim should be of no account except for the purpose of sentence.
- (ii) To list and define the different objects which persons who practise deception aim at achieving is unsatisfactory and dangerous, because it is impossible to be certain that any list would be complete. Technical distinctions would also inevitably be drawn - as they have been drawn under 1916 s. 32 - between conduct which did and which did not fall within the list. As a result dishonest persons might escape conviction.
- (iii) A single general offence in the form of clause 12(3) would be in accordance with the scheme of the Bill and would result in a great simplification of the law.

- (iv) The aim of this part of the criminal law is to protect the public from dishonest deception being practised upon them, and the more widely the provision is drafted the more effectually the criminal law will give this protection.

(99)The case for the proposal mentioned in paragraph 97(ii) to create only specific offences of criminal deception is that the creation of a general offence as under clause 12(3), even with the comparatively low maximum penalty of two years' imprisonment, is undesirable. The objections put forward to clause 12(3) were these.

- (i) The terms of clause 12(3) are extremely general, whereas it is a principle of English law to give reasonably precise guidance as to what kinds of conduct are criminal. The expression "dishonestly", "gain" and "deception" are not enough for so general a provision as clause 12(3).
- (ii) The offence itself would be a preparatory one and, furthermore, would create the concomitant offence of attempting to commit it. It could well introduce a principle of liability for preparatory acts wider than that recognised in the existing law relating to attempts and cover deception not proximate enough to the intended gain to justify making it criminal on hitherto accepted principles.
- (iii) The offence would cover many minor cases of deception of various descriptions which public opinion has not regarded, and would scarcely now regard, as requiring the application of the criminal law to them - for example, offences by traders, advertisers, applicants for employment and persons soliciting the temporary use of an article or some service. The offence would also cover deceptions of a kind which, though criminal under the existing law, are only punishable with minor penalties on summary conviction - for example, using an out-of-date season ticket or committing the offence recently created by s. 13(b) of the Severn Bridge Tolls Act 1965 (c. 24) of fraudulently claiming or taking exemption from tolls. No such general extension of the criminal sanctions against deception is called for. Serious cases are adequately covered by other provisions of the Bill together with other general offences such as forgery or perjury, less serious cases by special provisions dealing with and adapted to a wide variety of subjects.
- (iv) There would be overlapping between the offence under clause 12(3) and other offences under the Bill, including the complete overlapping (save for the penalties) with the other two offences under clause 12 itself.
- (v) It is illogical that, while appropriating property generally without an intention permanently to deprive the owner is not made theft or any other offence (paragraph 56), and obtaining property by deception without such an intention is not made an offence under clause 12(1) (paragraph 89), deception in order to obtain the loan of a thing will be an offence under clause 12(3).

(100)The opinion of the committee as a whole was that the scheme of clause 12 was the most satisfactory one to adopt having regard to the opposing views set out above. They recognised the advantages of creating a single general offence of criminal deception in accordance with the proposal described in paragraph 97(i). But most members did not favour this course, because they thought that a maximum penalty which would be high enough for the offences under clauses 12(1) and (2) and 16(2) would be too high for the general offence under clause 12(3). They considered however that the offence under clause 12(3), with a maximum penalty of two years' imprisonment, would be a useful one to cover cases of the kind mentioned in paragraph 96, and that its generality was justified in principle and would do no harm in practice. As to the particular objections set out in paragraph 99 their views are given below.

- (i) They do not think that the notion of dishonestly using deception with a view to gain to so general or uncertain to be made the basis of a criminal offence. The notion of dishonestly seems clear enough without a definition (cf. paragraph 88): and the definition of "deception" in clause 12(4) (referred to in paragraph 101) and that of gain in clause 28(2)(a) seem sufficient for the purpose of clause 12(3). Moreover the expressions "dishonestly" and "deception" correspond to the expressions "with intent to defraud" and "false pretences" in 1916 s. 32(1). In any prosecution for an offence under clause 12(3), as for an offence under 2. 32(1), the indictment would have to give sufficient particulars of the alleged deception.
- (ii) It seems to the committee generally that the deception or attempted deception is sufficiently proximate to the gain to justify making it criminal. A person who dishonestly uses or attempts to use deception in the way and for the purpose mentioned will have advanced a considerable way in wrongdoing.
- (iii) Any general offence of dishonestly is bound to include case which will be too trivial to deserve punishment. This is equally true of obtaining by false pretences under the existing law (or the corresponding offence under clause 12(1) of the Bill) and indeed of theft. Despite the many summary offences aimed at the making of dishonest gains, the general view of the committee is that the existing law, even with the extensions proposed elsewhere in the Bill, does leave a gap by which serious cases of fraud may escape adequate punishment, and that this gap ought to be filled. Using an out-of-date season ticket and avoiding paying tolls may be trivial examples of obtaining services by deception and deserve only a minor penalty on summary conviction, but there can be much graver frauds of a similar character. The existing summary offences, which have been created for a variety of purposes and sometimes go further than clause 12(3) (for example, in covering statements made recklessly but not otherwise dishonestly), do not do away with the need for a more serious offence of swindling in whatever shape or context.
- (iv) It does not seem to the committee generally to be a disadvantage that the offence under clause 12(3) should cover or overlap other offences under the Bill. It seems to them convenient that there should be a residual

offence which can be charged when it may be impossible to prove the existence of factors necessary to constitute more serious offences of deception.

- (v) It is recognised that it may seem curious that deception in order to obtain the loan of a thing should be an offence under clause 12(3) when temporary appropriation generally is not an offence. But it is not necessarily an objection to a Bill that it omits to provide for some kinds of conduct comparable with other for which it does provide. Moreover there are, as mentioned in paragraph 56, to making temporary appropriation criminal: and the offence under clause 12(3) does at least require that the loan should have been obtained or sought by deception and with a view to gain.

One member of the committee remains unable to accept the view that the arguments in this paragraph are sufficient to outweigh the objections to clause 12(3) set out in paragraph 99.

(101) The definition of “deception” in clause 12(4) will, as mentioned in paragraph 87, have the effect of considerably widening the scope of the present offence of obtaining by false pretences. The changes, or possible changes, are referred to below.

- (i) The provision that deception may be “deliberate or reckless” may or may not be an extension of the present law as to the meaning of “false pretence”. The doubt arises because the relation between deception and recklessness for the purpose of offences of dishonesty has caused a good deal of difficulty. This is shown by the differences of judicial opinion in the cases (summarised in Archbold’s “Pleading, Evidence and Practice in Criminal Cases”, 35th Edition, paragraph 2047) on the meaning of “reckless” for the purpose of the offence of inducing persons to invest money by “the reckless making of any statement, promise or forecast which is misleading, false or deceptive” under s. 13 of the Prevention of Fraud (Investments) Act 1958 (c. 45) or its predecessor. In our opinion it is right that deception for the purpose of the offences under clause 12 should cover recklessness in the sense of not caring whether the statement is true or false (the kind of recklessness which counts as deception for the purpose of the civil law, as in *Derry v. Peek* (1889), 14 App. Cas. 337), but not mere carelessness. This result will, we believe, be secured by the words quoted in the definition. We do not think that the effect will be to widen the offences unduly, especially as they will in any event depend on dishonesty.
- (ii) The provision that deception should include deception as to law as well as deception as to fact is included because it is obviously desirable that a false statement as to law should count for the purpose of the offences. There is little doubt that a false pretence as to law would be held to be within 1916 s. 32, but there is not definite authority on this; and since “deception” is being defined, it is better to settle the matter in the sense mentioned above.
- (iii) As mentioned in paragraph 87, “false pretence” in 1916 s. 32 is confined to pretences as to existing facts and does not include a pretence as to

intentions. In *Dent*, [1955] 2 Q.B. 590 ; 39 Cr. App. R. 131, the Court of Criminal Appeal rejected an argument that the rule that a false statement of intention is a statement of fact giving rise to civil liability applied to criminal liability also. This is an important gap in the criminal law. It has the result among others that a person who undertakes to do work for another and gets money from him on the false pretence that he intends to buy materials for the work, and keeps the money but does not do the work, is not guilty of any offence. For a time after *Dent's* case this kind of cheating was, as mentioned in paragraph 95(v), successfully prosecuted as obtaining credit by fraud under s. 13(1) of the Debtors Act 1869 until the House of Lords held in *Fisher v. Raven* that this offence applied only to obtaining credit in respect of the payment of money and not to obtaining credit in respect of the performance of services. In *Fisher v. Raven* Lord Dilhorne L.C. said ([1964] A.C. at p. 233 ; 47 Cr. App. R. at p. 195) that the result of the decision might be that “some fraudulent persons may escape justice” and that a possible way of “closing this gap in the criminal law” would be “to change the law so that a false pretence need no longer be a pretence as to an existing fact.” We agree that this gap should be closed, and clause 12(4) does so in the way which Lord Dilhorne suggested.* (As mentioned in paragraph 95(v) the Bill also reverses the

* The proposed change is not as revolutionary as may appear, because even under the existing law there are many situations in which a false representation as to intention may be punished. Not only is there the offence of obtaining credit by fraud, but decisions such as *Buckmaster* (mentioned in paragraph 26) and *Russell*, [1892] 2 QB. 312, show that the law of larceny by a trick may be used where there is a false representation of intention; and so also may the law of conspiracy to defraud (*Ormen* (1880), 14 Cox 381). The cheat may even be convicted of obtaining by false pretences if it is possible to infer a representation as to some non-mental fact. In practice, if the defendant promises to do something at once, it is nearly always possible to infer a representation as to present ability to perform and the defendant can be convicted of obtaining by false pretences where the representation is false. Examples of false statements of fact coupled with fraudulent promises are: where the defendant falsely represented that he had bought skins and would sell them to the prosecutor (*West* (1865), Dears, & B. 575); where he falsely represented that he was an unmarried man and would marry the prosecutrix (*Jennison* (1862), L & C. 157); where a woman represented that she had supernatural powers and would exercise them for the prosecutor's benefit (*Giles* (1865), L & C. 502; 169 ER 1490), where the defendant falsely represented that he was about to publish a directory and would include the prosecutor's name in it (*Bancroft* (1909), 3 Cr. App. R. 16); and where a “club hostess” falsely represented by conduct that she had access to a bedroom and was prepared to submit to sexual intercourse with the prosecutor (*Caslin* (1960), 45 Cr. App. R. 47). Since the prosecutor's real complaint may be the defendant's dishonest promise, it is unsatisfactory that it should be necessary to find some implied representation as to non-mental facts in order to bring the case within the criminal law. In *Gordon* (1889), 23 QBD. 354, a moneylender procured a client to sign a promissory note by impliedly and fraudulently representing that he had the money then ready to advance on the security of it. He was convicted of the offence under 1861 s. 90 of fraudulently causing a person to make a valuable security by false pretences, and his conviction was affirmed by the Court for Crown Cases Reserved. The court inferred a fraudulent misrepresentation by the moneylender that he had the money at hand and ready to be handed over. If the moneylender could have proved that he had the money in a drawer, he presumably could not have been convicted; yet from the point of view of the borrower the important question was whether the moneylender intended to hand the money over.

The general rule that a false representation as to intention is not sufficient to ground a charge of obtaining by false pretences seems to be a relic of the early hostility of the courts

effect of *Fisher v. Raven* by extending the offence of obtaining credit by deception so as to include credit in respect of certain things other than the payment of money.)

- (iv) We considered at length whether to include a provision to settle the law on another point, namely when a dishonest omission to correct a mistaken belief and other kinds of dishonest concealment should count as deception for the purpose of the clause. Several possible situations could be provided for. For example, a statement may be true when made but afterwards become untrue to the maker's knowledge; or it may be untrue but the maker may believe it to be true at the time but afterwards find out that it was untrue; or it may be true but the maker may know that the person to whom he made it has misunderstood it. There may also be deception by the mere concealment of a material fact, as for example when the seller of a motor-car conceals a defect actively or by silence. After considering several possible provisions we decided not to expand the definition of "deception" in order to define the cases in which these kinds of omission or concealment should count as deception. It would be very difficult to provide specifically for all the possible cases without greatly overloading the clause. There is also the complication that concealment in some of the cases mentioned would not give rise to liability in civil law, while in others the matter is or may be doubtful. In particular, account would have to be taken of the rule in civil law that a seller is not in general obliged to point out to a purchaser defects of which the seller is aware. Whatever may be thought of the merits of this rule, to make it a criminal offence to conceal something which a person is not obliged in the civil law to disclose seems to be too great an extension. The effect might even be indirectly to change the rule in the civil law on the ground that, Parliament having made the concealment criminal, liability under the civil law should follow. To provide expressly that concealment should be criminal only when there is a duty in the civil law to make disclosure would be unwelcome for criminal lawyers, who quite properly object to legislation by reference to the civil law. Although we decided to include no provision to deal with special cases of this kind, we are satisfied that the definition is wide enough to cover all

to this part of the law. In *Goodhall* (1821), Russ. & Rv. 461; 168 ER 898, it was held, on a case reserved, that to obtain meat, promising to pay for it but not so intending, was not obtaining by a "false pretence" under s. 1 of 30 Geo. 2. c. 24 (1757). The judges said that "it was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it". At the present day we do not generally regard it as incumbent upon people to use due care not to be cheated. Other arguments used in support of the rule are the argument that intention cannot be known and the fear that, if the rule were otherwise, disappointed creditors would resort to criminal proceedings instead of bringing a civil action. But the first of these arguments is an ancient heresy which is ignored every day in the courts; in the civil law it is now clearly settled that "the state of a man's mind is as much a matter of fact as the state of his digestion". As to the fear of abuse, this overlooks the heavy burden incumbent on the prosecutor to show not merely that the defendant did not perform his promise but that he did not intend to perform it when he made it. Some American jurisdictions have departed from the English rule by judicial decision, and Canada and two of the States of Australia (New South Wales and Victoria) have altered it by statute. English experience of the law of larceny by a trick, conspiracy to defraud and obtaining credit by fraud, where false statements of intention are penalised, does not suggest that the fear of abuse is well founded.

kinds of deception which have been held to be false pretences for the purposes of 1916 s. 32. We are also satisfied that the definition in clause 12(4) will provide sufficient guidance to the courts (in particular, owing to the words “any deception ... by words or conduct”) to enable them to decide whether any case of omission or concealment which may arise should be regarded as deception.

APPENDIX B

EXTRACTS FROM RELEVANT LEGISLATION

THEFT ACT 1968

1 Basic definition of theft

- (1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and “thief” and “steal” shall be construed accordingly
- (2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief’s own benefit.
- (3) The five following sections of this Act shall have effect as regards the interpretation and operation of this section (and, except as otherwise provided by this Act, shall apply only for purposes of this section).

2 Dishonesty

- (1) A person’s appropriation of property belonging to another is not to be regarded as dishonest –
 - (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or
 - (b) if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or
 - (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
- (2) A person’s appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

3 Appropriation

- (1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.
- (2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring shall, by reason of any defect in the transferor’s title amount to theft of the property.

4 Property

- (1) "Property" includes money and all other property, real or personal, including things in action and other intangible property
- (2) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except in the following cases, that is to say –
 - (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or
 - (b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or
 - (c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.

For purposes of this subsection "land" does not include incorporeal hereditaments; "tenancy" means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and "let" shall be construed accordingly.

- (3) A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose.

For purposes of this subsection "mushroom" includes any fungus, and "plant" includes any shrub or tree.

- (4) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcase of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession.

5 Belonging to another

- (1) Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).
- (2) Where property is subject to a trust, the persons to whom it belongs shall be regarded as including any person having a right to enforce the trust, and

an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right.

- (3) Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds shall be regarded (as against him) as belonging to the other.
- (4) Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.
- (5) Property of a corporation sole shall be regarded as belonging to the corporation notwithstanding a vacancy in the corporation.

6 Intention permanently to deprive the other

- (1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
- (2) Without prejudice to the generality of subsection (1) above, where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

15 Obtaining property by deception

- (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.
- (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain.
- (3) Section 6 above shall apply for purposes of this section with the necessary adaptation of the reference to appropriating, as it applies for purposes of section 1.
- (4) For purposes of this section "deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including

a deception as to the present intentions of the person using the deception or any other person.

15A Obtaining a money transfer by deception

- (1) A person is guilty of an offence if by any deception he dishonestly obtains a money transfer for himself or another.
- (2) A money transfer occurs when –
 - (a) a debit is made to one account;
 - (b) a credit is made to another, and
 - (c) the credit results from the debit or the debit results from the credit.
- (3) References to a credit and to a debit are to a credit of an amount of money and to a debit of an amount of money.
- (4) It is immaterial (in particular) –
 - (a) whether the amount credited is the same as the amount debited;
 - (b) whether the money transfer is effected on presentment of a cheque or by another method;
 - (c) whether any delay occurs in the process by which the money transfer is effected;
 - (d) whether any intermediate credits or debits are made in the course of the money transfer;
 - (e) whether either of the accounts is overdrawn before or after the money transfer is effected.
- (5) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding ten years.

16 Obtaining a pecuniary advantage by deception

- (1) A person who by any deception dishonestly obtains for himself or another any pecuniary advantage shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
- (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where –
 - (a) [repealed by Theft Act 1978, s.5(5)];
 - (b) he is allowed to borrow by way of overdraft, or to take out any policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or

(c) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.

(3) For purposes of this section “deception” has the same meaning as in section 15 of this Act.

20 Procuring the execution of a valuable security

(2) A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception procures the execution of a valuable security shall on conviction on indictment be liable to imprisonment for a term not exceeding seven years; and this subsection shall apply in relation to the making, acceptance, indorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and in relation to the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as, a valuable security, as if that were the execution of a valuable security.

34 “Gain” and “loss”

(2) For purposes of this Act –

(a) “gain” and “loss” are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and –

(i) “gain” includes a gain by keeping what one has, as well as a gain by getting what one has not; and

(ii) “loss” includes a loss by not getting what one might get, as well as a loss by parting with what one has;

THEFT ACT 1978

1 Obtaining services by deception

(1) A person who by any deception dishonestly obtains services from another shall be guilty of an offence.

(2) It is an obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.

(3) Without prejudice to the generality of subsection (2) above, it is an obtaining of services where the other is induced to make a loan, or to cause or permit a loan to be made, on the understanding that any payment (whether by way of interest or otherwise) will be or has been in respect of the loan.

2 Evasion of liability by deception

(1) Subject to subsection (2) below, where a person by any deception –

- (a) dishonestly secures the remission of the whole or any part of any existing liability to make a payment, whether his own or another's; or
- (b) with intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor or any person claiming payment on behalf of the creditor to wait for payment (whether or not the due date for payment is deferred) or to forgo payment; or
- (c) dishonestly obtains any exemption from or abatement of liability to make a payment;

he shall be guilty of an offence.

- (2) For purposes of this section “liability” means legally enforceable liability; and subsection (1) shall not apply in relation to a liability that has not been accepted or established to pay compensation for a wrongful act or omission.
- (3) For purposes of subsection (1)(b) a person induced to take in payment a cheque or other security for money by way of conditional satisfaction of a pre-existing liability is to be treated not as being paid but as being induced to wait for payment.
- (4) For purposes of subsection (1)(c) “obtains” includes obtaining for another or enabling another to obtain.

APPENDIX C

ARTICLES 5 AND 7 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 5

Right to liberty and security

- (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- (3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of the article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

- (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

ARTICLE 7

No punishment without law

- (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.